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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 14

ALBERT BENJAMIN CHANDLER, INDIVIDUALLY AND AS GOVERNOR OF THE COMMONWEALTH OF KENTUCKY, ET AL., PETITIONERS,

vs.

JAMES W. WISE AND RAY B. MOSS

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

PETITION FOR CERTIORARI FILED MARCH 30, 1938.

CERTIORARI GRANTED APRIL 11, 1938.

SUPREME COURT OF THE UNITED STATES

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[fol. 5]

IN CIRCUIT COURT OF FRANKLIN COUNTY

JAMES E. WISE and RAY B. Moss, Plaintiffs,

vs.

ALBERT BENJAMIN CHANDLER, Governor of the Commonwealth of Kentucky; Keen Johnson, Lieutenant Governor of the Commonwealth of Kentucky and President of the Senate of the General Assembly of Kentucky; Charles D. Arnett, Secretary of State of the Commonwealth of Kentucky; John Kirtley, Speaker of the House of Representatives of the General Assembly of Kentucky; William A. Perry, Chief Clerk of the Senate of the General Assembly of Kentucky; Brooks Hargrove, Chief Clerk of the House of Representatives of the General Assembly of Kentucky, Defendants

PETITION IN EQUITY—Filed January 15, 1937

The plaintiffs, James E. Wise and Ray B. Moss, state that the plaintiff, James E. Wise, is a citizen, resident, taxpayer and voter of Elizabethtown, Hardin County, [fol. 6] Kentucky; that the plaintiff, Ray B. Moss, is a citizen, resident, tax-payer and voter of Pineville, Bell County, Kentucky, and that the said plaintiffs bring this action as citizens and taxpayers of the Commonwealth of Kentucky and the United States of America against the defendants, Albert Benjamin Chandler, Keen Johnson, Charles D. Arnett, John Kirtley, William A. Perry and Brooks Hargrove, and allege as follows:

(1) The defendant, Albert Benjamin Chandler, is now and at all times herein mentioned has been the duly elected, qualified and acting Governor of the Commonwealth of Kentucky and said defendant is a citizen of the State of Kentucky and resides in Versailles, Woodford County, in said state.

(2) The defendant, Keen Johnson, is now and at all times herein mentioned has been the duly elected, qualified and acting Lieutenant Governor of the Commonwealth of Kentucky and, by virtue of that office, President of the Senate

of the General Assembly of Kentucky and that said defendant is a citizen of the Commonwealth of Kentucky and resides in Richmond, Madison County, in said state.

(3) The defendant, Charles D. Arnett, is now and at all times herein mentioned has been the duly elected, qualified and acting Secretary of State of the Commonwealth of [fol. 7] Kentucky and a citizen and resident of Louisville, Jefferson County, Kentucky.

(4) The defendant, John Kirtley, is now and at all times herein mentioned has been the duly elected, qualified and acting Speaker of the House of Representatives of the General Assembly of Kentucky and a citizen and resident of Island, McLean County, Kentucky.

(5) The defendant, William A. Perry, is now and at all times herein mentioned, has been the duly elected, qualified and acting Chief Clerk of the Senate of the General Assembly of Kentucky and said defendant is a citizen and resident of Louisville, Jefferson County, Kentucky.

(6) The defendant, Brooks Hargrove, is now and at all times herein mentioned has been the duly elected, qualified and acting Chief Clerk of the House of Representatives of the General Assembly of Kentucky and is a citizen and resident of Stanford, Lincoln County, Kentucky.

(7) On June 2, 1924, the sixty-eighth Congress of the United States proposed the following amendment to the Constitution of the United States:

"Section 1. The Congress shall have power to limit, regulate and prohibit the labor of persons under eighteen years of age.

[fol. 8] "Section 2. The Power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress."

(8) On March 24, 1926, the General Assembly of the Commonwealth of Kentucky duly considered the aforesaid proposed so-called Child Labor Amendment to the Constitution of the United States and duly enacted the following concurrent resolution or act of the legislature of the Commonwealth of Kentucky:

"Be it resolved by the Senate of Kentucky, the House of Representatives concurring therein:

Sec. 1. That the said proposed Amendment to the Constitution of the United States of America be, and the same is hereby rejected by the General Assembly of the Commonwealth of Kentucky.

Sec. 2. That certified copies of this Concurrent Resolution be forwarded by the Governor of this Commonwealth to the Secretary of State in Washington, D. C., and to the Presiding Officer of the United States Senate and the Speaker of the House of Representatives of the United States."

[fol. 9] And pursuant to said authority certified copies of the above concurrent resolution were forwarded by the Governor of the said Commonwealth to the Secretary of State in Washington, D. C., and to the Presiding Officer of the United States Senate and to the Speaker of the House of Representatives of the United States.

(9) Prior to said March 24, 1926, the so-called Child Labor Amendment to the Constitution of the United States had been duly rejected by more than a majority of the legislatures of the states of the Union and for that reason prior even to the rejection of it by the Legislature of the Commonwealth of Kentucky the so-called Child Labor Amendment was finally and conclusively rejected and defeated.

(10) On December 23, 1936, the defendant, Albert Benjamin Chandler, as Governor of the Commonwealth of Kentucky, issued a proclamation stating that an emergency existed and convening the General Assembly of Kentucky in extraordinary session at Frankfort, Kentucky, for the purpose of considering certain subjects which did not include the subject of reconsidering the aforesaid proposed Child Labor Amendment to the Constitution of the United States.

[fol. 10] (11) On January 8, 1937, the defendant, Albert Benjamin Chandler, as Governor of the Commonwealth of Kentucky, did unlawfully issue an amendment to the aforesaid proclamation of December 23, 1936, which reads as follows:

"Whereas, Both houses of Congress of the United States by a constitution- majority of two-thirds thereof has

adopted a joint resolution proposing to amend the Constitution of the United States in such manner as to authorize Congress to limit, regulate and prohibit the labor of persons under eighteen years of age; and

"Whereas, the General Assembly of the Commonwealth of Kentucky should have an opportunity immediately to ratify the said amendment:

Now, Therefore, In order that the General Assembly may consider the ratification of said amendment according to the power vested in me by the Constitution of Kentucky I do issue this my proclamation amending the proclamation convening the General Assembly of Kentucky in extraordinary session at the seat of government in Frank-
[fol. 11] fort, Kentucky, at one o'clock P. M. on Wednesday, December 23, 1936, by adding the following item thereto:

"29—To enact a joint resolution ratifying the proposed amendment to the Constitution of the United States providing that Congress shall have power to limit, regulate and prohibit the labor of persons under eighteen years of age.

"Given under my hand this the 8th day of January, 1937.

"By the Governor:

A. B. Chandler, Governor of Kentucky. Charles D. Arnett, Secretary of State."

(12) On January 12th, 1937, the Senate of the General Assembly of Kentucky by a vote of 19 to 14 unlawfully adopted a resolution purporting to ratify the proposed Child Labor Amendment to the Constitution of the United States. On January 13th, 1937, the House of Representatives of the General Assembly of Kentucky, by a vote of 59 to 24 unlawfully adopted the same resolution purporting to ratify the proposed Child Labor Amendment to the Constitution of the United States.

[fol. 12] (13) The aforesaid action of the Grand Assembly of Kentucky in attempting to revoke its previous action in rejecting the proposed Child Labor Amendment and in attempting to ratify said proposed amendments was and is unlawful and violative of the Constitution and laws of the United States and the Constitution and laws of the Commonwealth of Kentucky.

The General Assembly of Kentucky having duly rejected said proposed amendment, could not subsequent

thereto legally reconsider and adopt said proposed amendment without violating Article 5 of the Constitution of the United States and said action in attempting to reconsider and adopt said proposed amendment violated Article 5 of the Constitution of the United States because said action was not taken within a reasonable time after the amendment was proposed on June 2, 1924, by the Congress of the United States.

The defendant, Albert Benjamin Chandler, as Governor of the Commonwealth of Kentucky, had no authority to issue the aforesaid amended proclamation and said amended proclamation and the purported ratification pursuant thereto were and are unlawful and void.

(14) The defendants, Albert Benjamin Chandler, as Governor of the Commonwealth of Kentucky, Keen Johnson, as Lieutenant Governor of the Commonwealth of [fol. 13] Kentucky and as President of the Senate of the General Assembly of Kentucky, Charles D. Arnett, as Secretary of State of the Commonwealth of Kentucky, John Kirtley, as Speaker of the House of Representatives of the General Assembly of Kentucky, William A. Perry, as Chief Clerk of the Senate of the General Assembly of Kentucky, and Brooks Hargrove, as Chief Clerk of the House of Representatives of the General Assembly of Kentucky, and each of them are threatening and, unless restrained by this court will proceed to send certified copies of the aforesaid unlawful and void resolution purporting to ratify the proposed amendment to the Constitution of the United States to the Secretary of State of the United States in Washington and to the Presiding Officer of the United States Senate and to the Speaker of the House of Representatives of the United States, and the Secretary of State of the United States will by said notice be led to believe that said proposal has been ratified by the Legislature of Kentucky when in fact the action of the General Assembly of Kentucky in attempting to ratify said proposed amendment was and is unlawful and void.

(15) The plaintiffs are without adequate remedy at law in the premises and only by a suit of this nature and by the injunctive processes of this court can they be fully [fol. 14] protected, as citizens and taxpayers of the Commonwealth of Kentucky and United States of America, from the illegal and void action of the General Assembly

of Kentucky. Unless this court grants injunctive process as hereinafter prayed, these plaintiffs will each be irreparably damaged and the questions here involved can be adequately determined only in a suit of this nature.

(16) Plaintiffs state that no injunction against the acts complained of herein has been refused by this court or by any circuit judge. Plaintiffs state that irreparable injury will result to each of them from the delay of giving notice and that a temporary restraining order should be issued without notice and hearing.

Wherefore the plaintiffs pray for the following relief:

First, that the defendant, Albert Benjamin Chandler, as Governor of the Commonwealth of Kentucky, Keen Johnson, as Lieutenant Governor of the Commonwealth of Kentucky and as President of the Senate of the General Assembly of Kentucky, Charles D. Arnett, as Secretary of State of the Commonwealth of Kentucky, John Kirtley, as Speaker of the House of Representatives of the General Assembly of Kentucky, William A. Perry, as Chief Clerk [fol. 15] of the Senate of the General Assembly of Kentucky, and Brooks Hargrove, as Chief Clerk of the House of Representatives of the General Assembly of Kentucky, and each of them, be restrained and temporarily and permanently enjoined from sending certified copies of the aforesaid unlawful and void resolution purporting to ratify the proposed amendment to the Constitution of the United States to the Secretary of State of the United States in Washington, D. C., and to the Presiding Officer of the United States Senate and to the Speaker of the House of Representatives of the United States, or any of them; that the said defendants and each of them be restrained and temporarily and permanently enjoined from notifying in any manner the Secretary of State of the United States of the unlawful action of the General Assembly of Kentucky in attempting to ratify the proposed Child Labor Amendment.

Second, that the court adjudge and declare that the said action of the General Assembly of Kentucky in attempting to ratify the said proposed Child Labor Amendment violates the Constitution of the United States and the constitution of the State of Kentucky and that said action of the General Assembly is illegal and void.

Third, that the plaintiffs have all other relief to which [fol. 16] they may appear entitled.

Lafon Allen, Attorney for Plaintiffs. Oldham Clarke, Attorney for Plaintiffs.

Duly sworn to by J. E. Wise and Ray B. Moss. Jurat omitted in printing.

[fol. 17] In Circuit Court of Franklin County

Ordinary Summons

The Commonwealth of Kentucky to the Sheriff of Franklin County, Greeting:

You are commanded to summon Albert Benjamin Chandler, Governor of the Commonwealth of Kentucky, Keen Johnson, Lieutenant Governor of the Commonwealth of Kentucky and President of the Senate of the General Assembly of Kentucky, Charles D. Arnett, Secretary of State of the Commonwealth of Kentucky, John Kirtley, Speaker of the House of Representatives of the General Assembly of Kentucky, William A. Perry, Chief Clerk of the Senate of the General Assembly of Kentucky, Brooks Hargrove, Chief Clerk of the House of Representatives of the General Assembly of Kentucky to answer in 10 days after the service of the summons, a petition filed against them in the Franklin Circuit, by James E. Wise and Ray B. Moss and warn them that upon failure to answer, the petition will be taken for confessed or they will be proceeded against for contempt, and you will make due return of this summons within 10 days after the service thereof to the Clerk's Office of said Court.

Witness, Kelly C. Smither, Clerk of said Court, this 15th day of January, 1937.

Kelly C. Smither, Clerk, by Nell Sullivan, D. C.

[fol. 18] The Sheriff's return on the foregoing summons is in words and figures as follows:

Executed by delivering a true copy of the within summons to Keene Johnson, Charles D. Arnett, Secretary of State, John Kirtley, Speaker House, William A. Perry,

Clerk of Senate, Brooks Hargrove, Clerk of House, Governor A. B. Chandler not found.

This 15 day of January 1937.

G. Bain Moore, Sheriff Franklin County, by J. W. True, D. S.

[fol. 19] IN CIRCUIT COURT OF FRANKLIN COUNTY

[Title omitted]

RESTRAINING ORDER—January 15, 1937

The Commonwealth of Kentucky to the Sheriff of Franklin County, Greetings:

The defendants, Albert Benjamin Chandler, as Governor of the Commonwealth of Kentucky, Keen Johnson, as Lieutenant Governor of the Commonwealth of Kentucky and as President of the Senate of the General Assembly of Kentucky, Charles D. Arnett, as Secretary of State of the Commonwealth of Kentucky, John Kirtley, as Speaker of the House of Representatives of the General Assembly of Kentucky, William A. Perry, as Chief Clerk of the Senate of the General Assembly of Kentucky and Brooks Hargrove, as Chief Clerk of the House of Representatives of the General Assembly of Kentucky, and each of them, be [fol. 20] and they are hereby restrained and prohibited from sending certified copies of the aforesaid unlawful and void resolution purporting to ratify the proposed amendment to the Constitution of the United States to the Secretary of State of the United States in Washington, D. C., and to the Presiding officer of the United States Senate and to the Speaker of the House of Representatives of the United States, or any of them; that the said defendants and each of them be restrained from notifying in any manner the Secretary of State of the United States of the unlawful action of the General Assembly of Kentucky in attempting to ratify the proposed Child Labor Amendment until the further order of the Court.

This restraining order is granted according to the prayer of plaintiffs' petition herein upon the execution of bond conditioned according to law and the penalty of $500.00 whereupon the said plaintiffs, with Fidelity & Deposit Company of Maryland as surety, executed bond to the defend-

ants as required by law which is approved and ordered to be filed.

Witness my hand as Clerk of said Court this the 15th day of January, 1937.

Kelly C. Smither, Clerk Franklin Circuit Court.

[fol. 21] The Sheriff's return on the foregoing Restraining Order is in words and figures as follows:

Executed this 15th day January 1937 by delivering a true copy of the within order to: Lieut. Gov. Keene Johnson, Chas. D. Arnett, Sec. State, John Kirtley, Speaker of House, William A. Perry, Clerk of Senate, Brooks Hargrove, Clerk of House, Gov. A. B. Chandler not found in Franklin County.

G. Bain Moore, S.F.C., by J. W. True, D. S.

[fol. 22] In Circuit Court of Franklin County

[Title omitted]

Amended Petition in Equity—Filed February 20, 1937

Come plaintiffs and, before answer filed, amend their petition herein and say as follows:

(1) For amendment of paragraph (9) of the original petition, they say that up to and including March 24 ,1926, the ratification of the so-called Child Labor Amendment to the Constitution of the United States had been refused by the legislatures of 38 states, to-wit, Alabama, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South [fol. 23] Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming.

In the year 1927 the legislature of the State of Maryland also refused to ratify said amendment. During the same period from June 2, 1924, when said amendment was proposed by the Congress of the United States, to the end of the year 1927, five states had ratified said amendment, to-wit, Arizona, Arkansas, California, Montana (attempting to reverse its former action) and Wisconsin. Thus at the end

of the year 1927, which was three and a half years after the proposal of the said amendment by the Congress of the United States, the count stood 5 states for ratification and 37 states against ratification. In 1931 the legislature of the State of Colorado ratified said amendment, thus bringing the total number of ratifications up to 6 and bringing the rejections down to 36.

Thus the count stood until the year 1933, when an endeavor, originated and carried on by high officials of the Federal Government, was inaugurated to secure ratification by states that had not then acted on the question and a reconsideration of the subject by states which had theretofore rejected the amendment. The result of this endeavor has been that 16 states which had formerly rejected the amend-
[fol. 24] ment have now attempted to revoke their former action and to ratify it, to-wit, Idaho, Indiana, Iowa, Maine, Michigan, Minnesota, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Utah, Washington, West Virginia and Wyoming. In addition to this, 2 states, which had not theretofore acted upon the subject, also ratified the amendment, to-wit, Illinois and New Jersey. During this latter period, 2 states which had not theretofore acted upon the subject considered it and refused to ratify, to-wit, New York and Rhode Island. During the same period, 23 states which had theretofore rejected the amendment, reconsidered the subject and again rejected it, some of them more than once, to-wit, Connecticut, Delaware, Florida, Georgia, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, Nevada, New Mexico, New York, North Carolina, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont and Virginia. It thus appears that during the period following January 1, 1933, to date 39 states which had previously refused to ratify have reconsidered the subject, with the result that 16 of them have attempted to revoke their former action and to ratify said amendment and 23 have adhered to their former action rejecting the amendment.

[fol. 25] (2) Since the filing of the original petition in this action at 8:30 o'clock a. m. on Friday, January 15, 1937, certain transactions have taken place, hereinafter set forth, upon which plaintiffs rely as supporting their prayer for additional interlocutory relief, not prayed for in their original petition.

The original petition in this case was filed in the office of the Clerk of the Franklin Circuit Court at 8:30 a. m. on Friday, January 15, 1937. The Judge of that Court being absent from the county, application was made to the Clerk for the issuance of a restraining order in accordance with the prayer of the petition. The requisite bond was given and at 8:45 o'clock on that morning a restraining order was issued by the Clerk, which is a part of this record. Thereupon summons addressed to each of the defendants and attested copies of the said restraining order were placed in the hands of the Sheriff of Franklin County and by him given into the hands of two of his deputies for immediate service. At 9:05 o'clock on said morning the said deputies left the Sheriff's office with said papers and proceeded by automobile to the State Capitol for the purpose of serving same, having been instructed by the Sheriff to make the first service, if possible, upon the defendant, Albert Benjamin [fol. 26] Chandler, Governor of the Commonwealth of Kentucky. The deputy sheriff charged with the duty of serving the last mentioned defendant went at once to the Governor's office but was denied admittance to him and was unable to serve him with the papers aforesaid although he continuously endeavored to get access to the said defendant for that purpose. Despite the endeavors of said deputy sheriff to perform his duty, he was not able to make service upon said defendant until the hour of — on Friday, January 15, 1937, at which time, as was reported in an Associated Press dispatch appearing in the afternoon papers of that day, the said defendant, Albert Benjamin Chandler, Governor of the Commonwealth of Kentucky, stated he had theretofore on that day forwarded to the Secretary of State of the United States at Washington, by registered mail, a certified copy of the purported resolution of ratification adopted by the General Assembly of Kentucky, without knowledge on his part that the original petition in this action had been filed. These plaintiffs are informed and believe and, therefore, say that at the time when the said deputy sheriffs first reached the Capitol and endeavored to obtain service upon said defendant, Albert Benjamin Chandler, he had not then forwarded certified copies of said purported resolution of ratification to the Secretary of State of the United States. [fol. 27] Plaintiffs further allege that, when the said defendant, Albert Benjamin Chandler, Governor of the Commonwealth of Kentucky, was served with summons in this

action and with the restraining order hereinabove referred to, no notice of the purported ratification by the General Assembly of said Child Labor Amendment had been given to the Secretary of State of the United States or to any other Federal officer, that the said defendant could at that time have advised the Secretary of State of the United States of the pendency of this action, challenging the validity of said purported ratification and under the order of this court it was his duty to have done so and to have notified the Secretary of State that he had been restrained from giving him notice in any manner of said purported ratification. Plaintiffs say that the failure of said defendant, Albert Benjamin Chandler, after having been served with the restraining order aforesaid, to have so notified the Secretary of State of the United States of the pendency of this action and of the order which had been served upon him, was in itself a violation of said order.

Wherefore plaintiffs pray as in their original petition and further pray for a mandatory injunction requiring the [fol. 28] defendant, Albert Benjamin Chandler, Governor of the Commonwealth of Kentucky, to notify forthwith the Secretary of State of the United States by registered mail that before sending attested copies of the purported resolution of ratification to the Secretary of State of the United States, the validity of that resolution as an act of ratification of said amendment had been challenged in this proceeding, that prior to the receipt of said copies by the said Secretary of State of the United States he had been restrained by order of this court from giving notice to the Secretary of State of the United States in any manner and that any notice given in violation of said restraining order was and is null and void.

Lafon Allen, Oldham Clarke, Attorneys for Plaintiffs.

Duly sworn to by J. E. Wise. Jurat omitted in printing.

[fol. 29] In Circuit Court of Franklin County

[Title omitted]

Second Amended Petition in Equity—Filed February 20, 1937

Come plaintiffs, James E. Wise and Ray B. Moss, and for further amendment to their petition in equity herein state as follows:

(1) Plaintiffs, James E. Wise and Ray B. Moss, are now and were at all times herein mentioned duly elected, qualified and acting members of the Senate of the General Assembly of Kentucky and were present in the Senate on January 12, 1937, and each of said plaintiffs duly voted against the adoption of the resolution purporting to ratify the proposed Child Labor Amendment to the Constitution of the United States.

[fol. 30] (2) Plaintiffs say that the following is a list of the notifications filed with the Department of State of the United States, certifying the affirmative rejection of the so-called Child Labor Amendment by both houses of the Legislature of the respective states listed below.

In the left hand column are the dates upon which such certifications were received by the Department of State in Washington.

In the right-hand column are the dates upon which the proposed Amendment was rejected by the respective state legislatures.

Date of Receipt of Notification by Department of State		Date of Rejection by State Legislation
	Connecticut	
February 18, 1925	Senate	February 3, 1925
	House	February 11, 1925
	Delaware	
February 5, 1925	Senate	February 2, 1925
February 20, 1925	House	January 28, 1925
	Florida	
March 19, 1926	Rejected by Resolution	May 14, 1925
	Georgia	
December 26, 1924	Rejected by Resolution	August 6, 1924
	Indiana	
April 9, 1925	Senate	February 5, 1925
	House	March 5, 1925
[fol. 31]	Kansas	
February 2, 1925	Rejected by Resolution	January 27, 1925
	"Approved"	January 30, 1925
	Kentucky	
November 15, 1926	Rejected by Resolution	March 24, 1926

Date of Receipt of Notification by Department of State		Date of Rejection by State Legislation
	Maine	
September 8, 1925	Rejected by Resolution	April 10, 1925
	Maryland	
March 21, 1927	Rejected by Resolution	March 18, 1927
	Massachusetts	
March 2, 1925	Senate Resolution Rejecting	
November 10, 1933	House Resolution Rejecting	February 16, 1925
		February 19, 1925
	Minnesota	
May 19, 1925	Rejected by Resolution	April 14, 1925
	Missouri	
March 26, 1925	Rejected by Resolution	March 20, 1925
	New Hampshire	
March 28, 1925	Rejected by Resolution	March 28, 1925
	North Carolina	
November 22, 1924	Rejected by Resolution	August 23, 1924
	Pennsylvania	
May 23, 1925	Rejected by Resolution	April 16, 1925
	South Carolina	
February 21, 1925	Rejected by Resolution	January 27, 1925
	Tennessee	
February 11, 1925	Rejected by Resolution	[January 27, 1925]* February 4, 1925
	Texas	
March 2, 1925	Rejected by Resolution "Approved"	January 27, 1925 February 2, 1925.
[fol. 32]	Utah	
February 12, 1925	Rejected by Resolution	February 4, 1925
	Vermont	
February 28, 1925	Rejected by Resolution	February 26, 1925
	Virginia	
March 3, 1925	Rejected by Resolution	January 22, 1926

*[Matter enclosed in brackets, struck out in copy.]

Plaintiffs say that the foregoing facts are taken from a "Memorandum", prepared and furnished by the Depart-

ment of State of the United States at Washington, D. C., under date of December 19, 1936, a copy of which is attached hereto as an exhibit, marked 'Plaintiffs' Exhibit 1". They say that the facts stated therein are true.

Plaintiffs say that said "Memorandum" further shows, and it is true, that in February, 1925, the Legislature of South Dakota rejected a resolution of ratification of said proposed Amendment, by the action of both houses, and a certificate of said rejection was received by the Secretary of State of the United States on March 2, 1925.

Furthermore, the proposed Amendment was affirmatively rejected by resolution of both Houses of the Legislatures of the following States, on the dates given, although said action was not certified to the Secretary of State of the United States, to-wit:

[fol. 33] Mississippi:

Senate: February 13, 1936.
House: March 3, 1936.

Nebraska:

Both Houses: March 25, 1925.

New Mexico:

Both Houses: February 4, 1935.

Oklahoma:

Both Houses: January 27, 1925.

Washington:

Both Houses: January 29, 1925.

West Virginia:

Both Houses: April 7, 1925.

The foregoing tables show that, within two and a half years after the said amendment had been proposed by the Congress of the United States on June 2, 1924, twenty-four states, by the action of both Houses of their respective Legislatures, had by affirmative action rejected said proposed Amendment and that the action of twenty of said States had been duly certified to the Secretary of State of

the United States. It further shows that there had been certified to the Secretary of State the action of one State Legislature (South Dakota) in defeating, in both Houses, a resolution of ratification. Stated in tabular form, said rejections are as follows:

During the Year 1924:

Connecticut—Certified August, 1924.
North Carolina—Certified August, 1924.

[fol. 34] During the Year 1925:

Connecticut—Certified February, 1925.
Deleware—Certified January and February, 1925.
Florida—Certified May, 1925.
Indiana—Certified February and March, 1925.
Kansas—Certified June, 1925.
Maine—Certified April, 1925.
Massachusetts—Certified February, 1925.
Minnesota—Certified April, 1925.
Missouri—Certified March, 1925.
New Hampshire—Certified March, 1925.
Pennsylvania—Certified April, 1925.
South Carolina—Certified January, 1925.
Tennessee—Certified February, 1925.
Texas—Certified January, 1925.
Utah—Certified February, 1925.
Vermont—Certified February, 1925.
Nebraska—Rejected March, 1925; nor certified.
Oklahoma—Rejected January, 1925; not certified.
Washington—Rejected January, 1925; not certified.
West Virginia—Rejected April, 1925; not certified.
South Dakota—Ratification defeated in both houses February, 1925; certified March, 1925.

[fol. 35] During the Year 1926:

Kentucky—Certified March, 1926.
Virginia— Certified January, 1926.

During the Year 1927:

Maryland—Certified March, 1927.

Plaintiffs further say that, in addition to the adverse action of the States mentioned above, the said proposed

Amendment was rejected by the action of one House of the Legislature of each of the following States, on the dates given:

Colorado—Rejected by one House April 1, 1925.
Michigan—Rejected by one House February 20, 1925.
Nevada—Rejected by one House February 3, 1925.
Ohio—Rejected by one House January 27, 1925.
Oregon—Rejected by one House February 16, 1925.
Wyoming—Rejected by one House January 19, 1925.

It thus appears that with the rejection of the amendment by the Legislature of Maryland in March 1927, thirty-two States had rejected the proposed Amendment in one or other of the ways above described.

(3) The original petition herein was duly filed with the Clerk of the Franklin Circuit Court on January 15, 1937, at 8:30 o'clock a.m. and, the Judge of this court being [fol. 36] absent from the county, application was duly made to the Clerk for the issuance of a restraining order in accordance with the prayer of the petition. Immediately upon the filing of said petition, the Clerk duly issued the restraining order. After said petition was duly filed and the restraining order duly issued, the defendant, A. B. Chandler, wrote and mailed the following letter to the Hon. Cordell Hull, Secretary of State, Washington, D. C.:

MY DEAR MR. SECRETARY: "Jan. 15, 1937.

You will find enclosed herewith certified joint resolution passed by the General Assembly of Kentucky—ratifying the Child Labor Amendment.

A. B. Chandler, Governor of Kentucky."

The defendant, A. B. Chandler, inclosed with this letter copy of said joint resolution, a true and accurate copy of which is filed herewith as a part hereof and marked "Plaintiffs' Exhibit 2".

[fol. 37] On said January 15, 1937, defendant, A. B. Chandler, was duly notified of the pendency of this suit and the issuance of the restraining order and duly served with summons and attested copy of said restraining order.

On January 18, 1937, at 10:41 a.m., the Secretary of State of the United States at Washington received the aforementioned letter of January 15, 1937, from the defendant, A. B. Chandler.

Wherefore, plaintiffs pray as in their original petition as amended and further for a mandatory injunction requiring defendant, Albert Benjamin Chandler, individually and as Governor of the Commonwealth of Kentucky, and defendant, Charles D. Arnett, individually and as Secretary of State of the Commonwealth of Kentucky, to notify the Secretary of State of the United States that the resolution of the two Houses of the General Assembly of the Commonwealth of Kentucky, theretofore certified by them to the Secretary of State of the United States, was void and of no effect and for all other relief to which they may appear entitled.

Lafon Allen, Oldham Clarke, Attorneys for Plaintiffs.

[fol. 38] *Duly sworn to by Lafon Allen. Jurat omitted in printing.*

[fol. 39] EXHIBIT 1 TO 2ND AMENDED PETITION

DEPARTMENT OF STATE

December 19, 1936.

Memorandum

The Child Labor Amendment

By joint resolution of Congress of June 2, 1924, the following amendment to the Constitution of the United States (commonly known as the Child Labor Amendment) was proposed:

"Article —

"Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

"Sec. 2. The power of the several States is unimpaired by this Article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress."

[fol. 40] The records of the Department of State show action taken on the proposed amendment of the Legislatures of the respective States as follows:

		Date of receipt of notification by the Department
Alabama	No record of action.	
Arizona	Ratification by Resolution of January 28, 1925, approved January 29, 1925.	February 4, 1925
Arkansas	Ratification by resolution approved June 28, 1924.	July 2, 1924
California	Ratification by resolution of January 8, 1925.	March 5, 1925
Colorado	Ratification by resolution filed in the Office of the Secretary of State of Colorado on April 28, 1931.	May 2, 1931
Connecticut	Joint Resolution of Congress proposing the amendment rejected in the Senate of Connecticut, February 3, 1925, and in the House of Representatives of Connecticut February 11, 1925.	February 18, 1925
Delaware	Resolution proposing ratification of proposed amendment rejected in the House of Representatives of Delaware by 32 votes to none, 3 absent, January 28, 1925.	February 20, 1925
	Resolution proposing ratification of proposed amendment rejected in the Senate of Delaware by 17 votes to none. February 2, 1925.	February 5, 1925
Florida	Rejection by resolution filed in the Office of the Secretary of State of Florida on May 14, 1925.	March 19, 1926
Georgia	Rejected by resolution approved August 6, 1924.	December 15, 1924
[fol. 41]		
Idaho	Resolution proposing ratification of the proposed amendment was lost in the House of Representatives of Idaho on February 7, 1925, by a vote of 18 ayes, 38 nays, with 6 absent.	March 24, 1925
	Ratification by resolution of February 7, 1935.	February 18, 1935

		Date of receipt of notification by the Department
Illinois	Ratification by resolution of June 30, 1933.	August 21, 1933
Indiana	In the Senate of Indiana on February 5, 1925, the joint Resolution of Congress proposing the amendment was "indefinitely postponed and rejected" by a vote of 32 ayes, 16 noes. In the House of Representatives of Indiana on March 5, 1925, a motion that the Joint Resolution of Congress proposing the amendment be rejected "prevailed."	April 9, 1925
Iowa	Ratification by resolution.	February 21, 1935
	On March 11, 1925, the House of Representatives of Iowa "indefinitely postponed House Joint Resolution No. 2" which had for its purpose the ratification of the proposed amendment to the Constitution of the United States.	March 13, 1925
	Ratification by resolution on December 5, 1933.	December 21, 1933
Kansas	Rejected by resolution of January 27, 1925, approved January 30, 1925.	February 2, 1925
Kentucky	Rejection by resolution approved March 24, 1926.	November 15, 1926
Louisiana	Resolution of ratification of the proposed amendment rejected in the House of Representatives of Louisiana on June 27, 1924, by yeas 23, nays 55, absent 21. No action taken by the Senate of Louisiana.	February 12, 1925
[fol. 42]		
Maine	Rejection by resolve of April 10, 1925.	September 8, 1925
	Ratification by Resolve of December 16, 1933, approved December 16, 1933.	December 21, 1933
Maryland	Rejection by resolution approved March 18, 1927.	

		Date of receipt of notification by the Department
Massachusetts	Act of the Commonwealth of Massachusetts approved June 5, 1924, placing "upon the ballot to be used at the biennial State election in the current year the following question: Is it desirable that the general court ratify the following proposed amendment to the Constitution of the United States."	June 11, 1924
	The Senate of Massachusetts on February 16, 1925, rejected the proposed amendment by a vote of 33 yeas to 1 nay	March 2, 1925
	The House of Representatives of Massachusetts, on February 19, 1925, adopted by a vote of 204 yeas to 9 nays resolutions rejecting the proposed amendment.	November 10, 1933
Michigan	Ratification by resolution of May 10, 1933.	May 17, 1933
Minnesota	Rejection by resolution of April 14, 1925.	April 17, 1925
	Ratification by resolution of December 14, 1933, approved December 14, 1933.	December 18, 1933
Mississippi. [fol. 43]	No record of action.	
Missouri	Rejection by resolution of March 20, 1925.	March 26, 1925
Montana	Ratification by resolution approved February 11, 1927.	February 15, 1927
Nebraska	No record of action.	
Nevada	No record of action.	
New Hampshire	Rejection by resolution of March 18, 1925.	March 28, 1925
	Ratification by resolution of May 17, 1933.	May 23, 1933
New Jersey	Ratification by resolution of June 12, 1933.	June 15, 1933
New Mexico	No record of action.	
New York	No record of action.	
North Carolina	Rejection by resolution of	November 22, 1924

		Date of receipt of notification by the Department
North Dakota	Certificate dated January 28, 1925, that the Senate of North Dakota, by vote of 32 to 17, resolved not to ratify the proposed amendment to the Constitution.	January 31, 1925
	Ratification by resolution filed in the Office of the Secretary of State of North Dakota on March 4, 1933.	August 17, 1933
Ohio	Ratification by resolution of March 22, 1933.	May 31, 1933
Oklahoma	Ratification by resolution of July 5, 1933	July 13, 1933
Oregon	Ratification by resolution of January 31, 1933.	July 12, 1933
Pennsylvania	Rejection by resolution of April 16, 1925.	May 23, 1925
[fol. 44]	Ratification by resolution of December 21, 1933.	May 25, 1934
Rhode Island	No record of action.	
South Carolina	Rejected by resolution of January 27, 1925.	February 21, 1925
South Dakota	Certificate dated February 24, 1925, that the proposed amendment to the Constitution of the United States, having been duly proposed by a Joint Resolution in the Senate and the House of Representatives of South Dakota during its 19th Legislative Session "failed of passage." In the Senate of South Dakota the vote was: Yes, 5; No, 36; Absent and not voting, 1; Excused 3. In the House of Representatives of South Dakota the vote was: Yes, 26; No, 73; Absent and not voting, 1; Excused, 3.	March 2, 1925
	The South Dakota Legislature again rejected the proposed amendment to the Constitution of the United States at its Special Session which	March 17, 1934

		Date of receipt of notification by the Department
	convened July 31, 1933. This was by House Resolution No. 1, the vote being: Yes, 43; No, 48; Absent and not voting, 11; Excused, 1.	
Tennessee	Rejection by resolution of February 4, 1925.	February 11, 1925
Texas	Rejection by resolution of January 27, 1925, approved February 2, 1925.	March 2, 1925
Utah	Rejection by resolution of February 4, 1925.	February 12, 1925
	Ratification by resolution of February 5, 1935.	February 11, 1935
Vermont	Rejection by resolution certified February 26, 1925.	February 28, 1925
Virginia	Rejection by resolution of January 22, 1926.	March 3, 1926
[fol. 45]		
Washington	Ratification by resolution of February 3, 1933.	May 24, 1933
West Virginia	Ratification by resolution of December 12, 1933.	January 8, 1934
Wisconsin	Ratification by resolution filed in the office of the Secretary of State of Wisconsin, February 25, 1925.	February 28, 1925
Wyoming	Ratification by resolution of January 31, 1935, approved February 1, 1935.	March 2, 1935

[fol. 46] EXHIBIT 2 TO 2ND AMENDED PETITION

Senate Resolution No. 12

A Joint Resolution ratifying the proposed amendment to the Constitution of the United States to authorize Congress to limit, regulate and prohibit the labor of persons under eighteen years of age.

Whereas, Both Houses of the Congress of the United States of America by a constitutional majority of two-thirds thereof made the following proposition to amend the

Constitution of the United States of America, in the following words, to-wit:

"Joint Resolution, proposing to amend the Constitution relating to the limiting, regulation and prohibition of the labor of persons under 18 years of age:

"Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled—

"Two-thirds of each House concurring therein, that the following Article is proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as part of the Constitution, when ratified by the Legislature of three-fourths of the several states.

"Section 1. That Congress shall have power to limit, regulate and prohibit the labor of persons under 18 years of age.

"Section 2. The power of the several States is unim- [fol. 47] paired by this Article, except that the operation of the State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress therefore."

Be it Resolved by the General Assembly of the Commonwealth of Kentucky:

Section 1. That the foregoing and above recited amendment to the Constitution of the United States of America be and the same is hereby ratified by the General Assembly of the Commonwealth (State) of Kentucky as an amendment to the Constitution of the United States.

Section 2. That the Governor of the Commonwealth of Kentucky forthwith forward to the Secretary of State of the United States an authenticated copy of the foregoing Joint Resolution.

Keen Johnson, President of the Senate. John Kirtley, Speaker of the House.

This resolution is hereby approved—

A. B. Chandler, Governor of Kentucky.

[fol. 48] COMMONWEALTH OF KENTUCKY

Office of the Secretary of State

Certificate

I, Charles D. Arnett, Secretary of State for the Commonwealth of Kentucky, do certify that the foregoing writing

has been carefully compared by me with the original record thereof, now in my official custody Attorney General found to be a true and correct copy of

Senate Resolution No. 12, approved by Governor A. B. Chandler (no date) and received in the office of Secretary of State, January 15, 1937.

In Witness Whereof, I have hereunto set my hand and affixed my official seal.

Done at Frankfort this 2 day of March, 1937.

Chas. D. Arnett, Secretary of State. (Seal.)

[fol. 49] In Circuit Court of Franklin County

[Title omitted]

General Demurrer to Petition and Amended Petitions—Filed February 20, 1937

Come the defendants, Albert Benjamin Chandler, Governor, etc., et al., and demur generally to the petition and amended petition and second amended petition filed herein because neither said petition nor amended petition nor second amended petition state facts sufficient to constitute a cause of action against these defendants.

Wherefore, defendants pray judgment on their demurrer.

B. M. Vincent, Attorney General. J. J. Leary, J. W. Jones, Asst. Atty. Gen. Guy H. Herdman, Assistant Attorney General for Defendants.

[fol. 50] In Circuit Court of Franklin County

[Title omitted]

Order as to Answer, etc.—February 20, 1937

Come the defendants by Attorney and file their motion to dissolve and set aside the restraining order issued by the Clerk herein, and also file general demurrer to the petition and amended petition and second amended petition and upon motion of said defendants it is further ordered that the verified joint and separate answer of the defendants be filed, and that same be considered as the affidavit of defendants on

plaintiffs' motion for an injunction. The filing of said answer is without waiving or prejudice to the general demurrer to the petition and amended petition and second amended petition heretofore filed.

[fol. 51] IN CIRCUIT COURT OF FRANKLIN COUNTY

[Title omitted]

MOTION TO DISSOLVE RESTRAINING ORDER—Filed February 20, 1937

Come the defendants herein, Albert Benjamin Chandler, Governor, etc., et al., and move the Court to discharge the restraining order issued herein by the Clerk, and for cause say that before the suit was instituted the Resolution ratifying the proposed Child Labor Amendment to the Federal Constitution had been duly and properly adopted by both the Senate and House of the Kentucky General Assembly, and approved by the Governor, and that the Governor had at the time of service of the restraining order issued by the Clerk and without knowledge of said action, certified and mailed same to the Secretary of State of the United States [fol. 52] at Washington, D. C., and that said restraining order issued by said Clerk was thereby inoperative, futile and of no effect, and that said restraining order prayed in the amended petition is mandatory in character and beyond the power of the Clerk to issue, and that the order issued on the original petition cannot be extended to the amended petition, and that said restraining order should be discharged, dissolved and set aside.

Wherefore, defendants pray judgment on their motion herein.

B. M. Vincent, Attorney General. J. J. Leary, J. W. Jones, Asst. Atty. Gen. Guy H. Herdman, Assistant Attorney General for Defendants.

[fol. 53] IN CIRCUIT COURT OF FRANKLIN COUNTY

[Title omitted]

APPLICATION FOR INJUNCTION—Filed February 20, 1937

Come plaintiffs, James E. Wise and Ray B. Moss, and move the court for a temporary injunction in lieu of the

restraining order heretofore issued in this case and that a writ of temporary injunction issue out of and under the seal of this court and that said writ shall be and remain in full force and virtue until further order of the court in the premises.

Lafon Allen, Oldham Clarke, Attorneys for Plaintiffs.

[fol. 54] IN CIRCUIT COURT OF FRANKLIN COUNTY

#36715

JAMES E. WISE and RAY B. MOSS, Plaintiffs,

vs.

ALBERT BENJAMIN CHANDLER, Individually and as Governor of the Commonwealth of Kentucky, et al., Defendants

JUDGMENT

This action came on for hearing upon the defendants' general demurrer to the plaintiffs' petition as amended, defendants' motion to dissolve the Restraining Order, and upon plaintiff's application for a temporary injunction, pursuant to plaintiffs' verified petition as amended, and the Court having heard argument of counsel for the respective parties and being sufficiently advised in the premises,

It is Ordered, Adjudged and decided as follows:

[fol. 55] I

(1) Defendants' demurrer to plaintiffs' petition as amended is hereby sustained, upon the ground that the facts alleged are not sufficient to constitute a cause of action.

The cause of action coming on further to be heard, the plaintiffs decline to plead further herein and their petition as amended is hereby dismissed.

(2) Defendants' motion to dissolve the restraining order, which was duly issued by the Clerk of this Court on January 15, 1937, is sustained and said restraining order is hereby vacated and set aside.

(3) Plaintiffs' application for a temporary injunction is hereby denied.

The plaintiffs and each of them object and except to each of the foregoing rulings of the Court and pray an appeal to the Court of Appeals, which is hereby granted.

II

It is further ordered, adjudged and decreed that, upon terms that the plaintiffs shall within twenty days from the entry of this judgment take and perfect an appeal to the Court of Appeals and execute and file a bond conditioned according to law in the penalty of $500, an injunction pend-
[fol. 56] ing said appeal shall be and hereby is allowed, in terms prayed for in plaintiffs' original petition herein, to prevent the defendants or any of them from taking any action which would in any manner change the status existing immediately before the entry of this judgment. To which the defendants object and except.

March 2, 1937.

W. B. Ardery, Judge.

[fols. 57-58] In Court of Appeals of Kentucky, Fall Term
October 1, 1937

James E. Wise et al., Appellant,

Against

Albert Benjamin Chandler, Individually and as Governor of the Commonwealth of Kentucky, et al., Appellee

Appeal from a Judgment of the Franklin Circuit Court

Mandate

The Court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed, and cause remanded, with directions to overrule the demurrer to the petition and such further proceedings as are not inconsistent with the views herein; which is ordered to be certified to said Court. Whole Court Sitting.

A copy—Attest:

Chas. K. O'Connell, C. C. A., By Alice Griffin, D. C.

Issued 11-6-1937.

[fol. 59] IN CIRCUIT COURT OF FRANKLIN COUNTY

#36715

JAMES E. WISE and RAY B. MOSS, Plaintiffs

vs.

ALBERT BENJAMIN CHANDLER, Individually and as Governor of the Commonwealth of Kentucky, et al., Defendants

ORDER FILING MANDATE AND OPINION OF THE COURT OF APPEALS AND JUDGMENT IN ACCORDANCE THEREWITH—December 6, 1937

Come the plaintiffs, by counsel, and tender a true copy of the opinion of the Court of Appeals, in this action handed down October 1, 1937, and the mandate of the Court of Appeals herein, attested by the Clerk of said Court, the mandatory part of which reads as follows:

"The court being sufficiently advised, it seems to them the judgment is erroneous.

"It is therefore considered that said judgment be reversed, and cause remanded, with directions to overrule the demurrer to the petition and such further proceedings as are not inconsistent with the views herein."

[fol. 60] The copies of said opinion and mandate so tendered, are ordered filed and made parts hereof, marked "Exhibit A" and "Exhibit B", respectively.

I

It is Therefore Ordered, Adjudged and Decreed that, Defendants' demurrer to plaintiffs' petition as amended is hereby overruled.

II

The cause coming on further to be heard, the defendants decline to plead further and, it appearing to the court that the importance of this controversy to the State requires a decision upon the merits, it is therefore:

Ordered, Adjudged and Decreed as follows:

(1) An actual controversy exists between the parties to this action, the plaintiffs have the right to maintain the suit and the court has jurisdiction of this cause.

(2) The resolution of the Legislature of Kentucky adopted January 13, 1937, purporting to ratify the proposed amendment to the Constitution of the United States giving to the Congress the power to limit, regulate, and prohibit [fol. 61] the labor of persons under eighteen years of age, which amendment was proposed by the Congress on June 2, 1924, was and is invalid and void, and the said proposed amendment to the Constitution of the United States was not thereby ratified by the Legislature of Kentucky according to the provisions of the Constitution of the United States.

(3) The notice given by the defendant, the Hon. Albert Benjamin Chandler, Governor of the Commonwealth of Kentucky, by letter dated January 15, 1937, to the Hon. Cordell Hull, Secretary of State of the United States, and is of no effect.

(4) The Clerk of this Court is hereby directed to give official notice to the Department of State of the United States that the resolution of the Legislature of Kentucky, purporting to ratify the said proposed amendment to the Constitution of the United States, was and is invalid; that the proposed Amendment has not been ratified by the Legislature of Kentucky according to the provisions of the Constitution of the United States, and the notice given by the defendant, Hon. Albert Benjamin Chandler, Governor of the Commonwealth of Kentucky, by letter dated January 15, 1937, to the Hon. Cordell Hull, Secretary of State of the United States, was and is of no effect. The Clerk of this [fol. 62] Court if further directed to send a duly authenticated copy of this judgment to the Secretary of State of the United States, Department of State, Washington, D. C., by registered mail, with return receipt requested to be filed herein.

To all of which the defendants, and each of them, object and except, and pray an appeal to the Court of Appeals, which is granted.

December 6, 1937. W. B. Ardery, Judge.

Have Seen:

Lafon Allen, Oldham Clarke, Attorneys for Plaintiff.
Hubert Meredith, Attorney General, by J. W. J. Jones, Assistant Attorney General, Attorneys for Defendants.

[fol. 63] IN CIRCUIT COURT OF FRANKLIN COUNTY

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed December 6, 1937

To the Clerk of the Franklin Circuit Court:

You are hereby requested to make a transcript of the record filed in the Court of Appeals of Kentucky pursuant to an appeal allowed in the above styled action and to include in such transcript of record the following, and no other, papers and exhibits, to-wit:

(1) Petition in equity;
(2) Restraining order;
(3) Amended petition in equity;
(4) Second amended petition in equity and exhibits;
(5) Defendants' general demurrer to petition as amended;
[fol. 64] (6) Defendants' motion to dissolve restraining order;
(7) Application for injunction;
(8) Judgment of March 2, 1937;
(9) Judgment of December 6, 1937 and exhibits;
(10) This schedule;

Said transcript is to be prepared as required by law and the Rules of the Court of Appeals of Kentucky for filing with the Clerk of the Court of Appeals.

Lafon Allen, Oldham Clarke, Attorneys for Plaintiffs.
Hubert Meredith, Atty. Gen., by J. W. J., J. W. Jones, Asst. Atty. Gen., Attorneys for Defendants.

Dec. 6, 1937.

[fol. 65] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 66-67] Judge's certificate to clerk omitted in printing.

Clerk's certificate to judge omitted in printing.

[fol. 68] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

STATEMENT ON APPEAL—Filed December 17, 1937

(1) The names of the parties to this appeal are as stated in the above caption.

(2) The judgment appealed from was rendered by the Franklin Circuit Court on December 6th, 1937, and may be found on page 49 of the transcript of the record herein.

[fol. 69] (3) The appeal was granted below and no summons or warning order is desired.

(4) The names and addresses of counsel for the appellees are as foflows:

Lafon Allen and Oldham Clark both of Louisville, Kentucky.

(Signed) Hubert Meredith, Attorney. General;
(Signed) J. W. Jones, Asst. Atty. Gen., Attorneys for Appellants.

[File endorsement omitted.]

[fol. 70] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ORDER OF SUBMISSION—December 17, 1937

Came parties, by counsel, and filed joint motion to docket, advance and submit, which motion is sustained and case ordered docketed for the present term, advanced for hearing and submitted.

[fol. 71] IN COURT OF APPEALS OF KENTUCKY

ALBERT CHANDLER, Individually, etc. et al., Appellants,

vs.

JAMES E. WISE, et al., Appellees

Appeal from a Judgment of the Franklin Circuit Court

JUDGMENT—December 17, 1937

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment herein be affirmed; which is ordered to be certified to said court. Whole court sitting.

It is further considered that the appellees recover of the appellants, their costs herein expended.

[fols. 72-74] IN COURT OF APPEALS OF KENTUCKY

ALBERT BENJAMIN CHANDLER, etc., et al., Appellants,

v.

JAMES E. WISE and RAY B. MOSS, Appellees

Appeal from the Franklin Circuit Court

OPINION PER CURIAM—December 17, 1937

This case was before this court on a demurrer to the petition. Wise v. Chandler, 270 Ky. 1, 108 S. W. (2d) 1024. The judgment of the circuit court sustaining the demurrer was reversed for the reasons set out in that opinion. Upon the return of the case to the circuit court the defendants (now appellants) declined to plead further, and judgment was entered in conformity with the opinion of this court. No new issue or additional question is presented on this appeal, and the court has not changed its view on any of the questions formerly presented, including those raised under the Federal Constitution.

Judgment affirmed.

Whole Court sitting.

[fol. 74-1] IN COURT OF APPEALS OF KENTUCKY

JAMES E. WISE and RAY B. MOSS, Appellants,

v.

ALBERT BENJAMIN CHANDLER, etc., et al., Appellees

Appeal from the Franklin Circuit Court

OPINION OF THE COURT BY JUDGE STITES—October 1, 1937

This is an appeal from a judgment of the Franklin Circuit Court dismissing appellants' petition as amended on the ground of its alleged failure to state facts sufficient to constitute a cause of action. The suit was filed for the purpose of enjoining the Governor and other defendants from certifying to the Secretary of State of the United States, the Presiding Officer of the United States Senate, and the Speaker of the House of Representatives, copies of a resolution adopted at the Special Session of the General Assembly on January 13, 1937 (Acts, Fourth Special Session 1937, Chapter 30) purporting to ratify the so-called Child Labor Amendment to the Constitution of the United States on behalf of the State of Kentucky. In addition to the injunctive and general relief prayed, appellants asked for a declaration of rights concerning the [fol. 74-2] validity of the resolution of the General Assembly and of the status of the Amendment.

The petition was filed in the Franklin Circuit Court about 8 o'clock A. M. on January 15, 1937, bond was executed, and a restraining order was issued immediately against the defendants enjoining each of them from sending copies of the resolution to the Secretary of State, Presiding Officer of the Senate, or Speaker of the House. On the same day, but before he was actually served with a copy of the restraining order or summons in the suit, the Governor forwarded a certified copy of the resolution to the Secretary of State. It is not claimed that he knew of the pendency of this proceeding at the time of such action.

On the following day (January 16, 1937) appellants filed an amended petition in which they set out the action taken by the Governor since the filing of the suit, and they asked for a mandatory injunction to require him to notify the Secretary of State of the pendency of this proceeding and

that the notification then in the hands of the post-office for delivery to the Secretary of State was void and should be disregarded. No action was taken on this amended petition. Appellees, without questioning the right or capacity of appellants to bring the suit, filed a general demurrer to the petition as amended. The demurrer was sustained, and appellants declined to plead further. Their petition was dismissed, and this appeal followed.

On July 2, 1924, the Sixty-eighth Congress of the United States proposed the so-called Child Labor Amendment to the several States. We are not here concerned with the merits or demerits of the Amendment, but simply with the mechanical process of amending the Federal Constitution under Article V of that instrument providing, so far as pertinent to this case:

[fol. 74-3] "The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, * * * which * * * shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three-fourths of the several States or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress * * *."

During the year following the submission of the Amendment, in 1924, it was ratified by one State and rejected by three. In 1925 it was ratified by three additional States and rejected by an additional thirty-two. In 1926 the General Assembly of Kentucky adopted a resolution rejecting the Amendment, and its action was certified to the Secretary of State of the United States some six or seven months thereafter. One other State likewise rejected the Amendment that year. In 1927 Montana ratified the Amendment, although it had previously, in 1925, rejected it, and Maryland rejected it for the first time. No action at all was taken by any State, either one way or the other, during 1928, 1929, and 1930. In 1931 Colorado, after a previous rejection, ratified it. Again no action was taken in 1932, but in 1933 there was a general revival of interest in the question, and action either ratifying or rejecting it was taken in twenty-three States. Action was likewise taken in various States in each succeeding year thereafter. If a State which has once ac[illegible]on an amendment to the Federal

Constitution may act again and change its position thereon, then there were twenty-eight ratifications and twenty rejections standing at the date of the commencement of this action.

On December 23, 1936, the Governor of Kentucky issued a proclamation convening the General Assembly in Extraordinary Session for the purpose of considering certain enumerated subjects (Constitution of Kentucky, Section [fol. 74-4] 80) not including the proposed Amendment. On January 8, 1937, the Governor amended his call to include consideration of the Amendment, and the General Assembly thereupon adopted the resolution purporting to ratify the Amendment on behalf of the Commonwealth of Kentucky.

It is urged by appellants:

First. That the power reserved to the States by Article V of the Federal Constitution, to pass upon a proposal by Congress for an amendment of that instrument, when once affirmatively exercised, is exhausted and that the Kentucky legislature, having exhausted that power on March 24, 1926, by the adoption of a concurrent resolution of both Houses, affirmatively rejecting the Amendment in question, and having caused its action to be certified by the Governor of Kentucky to the Secretary of State of the United States, to the Presiding Officer of the United States Senate, and to the Speaker of the House of Representatives of the United States, had exhausted the power invoked by the Congressional proposal.

Second. That, including the rejection by the Kentucky legislature on March 24, 1926, the Amendment had then been affirmatively rejected by twenty-six States, in each instance by resolution of both houses of the legislature, that in twenty-one of those States the resolution has been duly certified to the Secretary of State of the United States and that the affirmative rejection of the Amendment by more than one-fourth of the States of the Union constituted a final and irrevocable decision of the referendum to the state legislatures of the Congressional proposal.

Third. That, in order to validate a proposed amendment as part of the Federal Constitution, ratification by three-fourths of the States must take place within such a reasonable time after its proposal as would make their action [fol. 74-5] an expression of the approval of the people,

sufficiently contemporaneous in that number of States to reflect the popular will in all sections of the country at relatively the same period (Dillon v. Gloss, 256 U. S. 368, 65 L. Ed. 994); that twelve years and seven months, which was the time that elapsed between the proposal of the Amendment by Congress on June 2, 1924, and the attempted ratification thereof by the Kentucky legislature on January 13, 1937, was not such a reasonable time; that at that time the Congressional proposal, if not conclusively defeated by the adverse action theretofore taken by the States, must, at least, be regarded as abandoned and that consequently said attempted ratification was of no effect.

Fourth. That the session of the Kentucky legislature at which the resolution of purported ratification was adopted was a special session and action upon the proposed Amendment was not one of the subjects mentioned in the Governor's proclamation convening that session.

It seems logically to follow from the provision in Article V of the Federal Constitution that the framers of that instrument contemplated that the effect of ratification or rejection by the States would be the same whether taken by the legislatures of the several States or by conventions held therein. "If an amendment to the Federal Constitution should be proposed by Congress, and submitted to State Conventions instead of the legislatures, the powers and disabilities of the two classes of bodies in respect to the amendment would, it is conceived, be precisely the same." Jameson, "A Treatise on Constitutional Conventions," 4th Ed., Sec. 586. In Hawke v. Smith, 253 U. S. 221, 40 S. Ct. 495, 64 L. Ed. 871, a case involving the adoption of the Eighteenth Amendment, the Court said:

"The proposed change can only become effective by the ratification of the legislatures of three-fourths of the States, [fol. 74-6] or by conventions in a like number of States. The method of ratification is left to the choice of Congress. Both methods of ratification, by legislatures or conventions, call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people."

It was conceded in argument of this case at the bar that the proposal by Congress of an amendment to the Federal Constitution was analogous to the making of an offer for

acceptance or rejection under the law of contracts. It is unnecessary to speculate, with Webster, Clay, or Calhoun, as to whether or not the Constitution is itself a fundamental charter of government or a compact between sovereign states. It is sufficient for our purposes to concede that there is an analogy to the principles of contract law in the processes of amending the Federal Constitution.

So far as we have been able to discover, no writer on the subject has undertaken to defend the position that the delegates to a State Convention, elected and assembled for the single purpose of acting upon a proposed amendment to the Federal Constitution, could reject the proposed amendment and thereafter, having adjourned sine die, reassemble and adopt a resolution of ratification. Even if it be conceded that a State might reject an amendment and later, while the amendment is still before the people, change its position thereon, certainly this power could not logically be said to exist after an amendment has been rejected by more than one-fourth of the States and these rejections duly certified to the Secretary of State of the United States.

In Dillon v. Gloss, 256 U. S. 368, the Court, in speaking of Article V, said:

"We do not find anything in the Article which suggests that an amendment once proposed is to be open to ratifica- [fol. 74-7] tion for all time, or that ratification in some of the States may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary. First, proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do. These considerations and the general purpose and spirit of the Article lead to the conclusion expressed by

Judge Jameson 'that an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress.' That this is the better conclusion becomes even more manifest when what is comprehended in the other view is considered; for, according to it, four amendments proposed long ago—two in 1789, one in 1810 and one in 1861—are still pending and in a situation where their ratification in some of the States many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable. We conclude that the fair inference or implication from Article V is that the ratification must be within some reasonable time after the proposal."

[fol. 74-8] The functional identity of state legislatures and state conventions is further indicated in the opinion in Hawke v. Smith, supra, where Mr. Justice Day, speaking for the Court, said:

"Ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the State to a proposed amendment."

We can find no logical point of difference in the ultimate result whether Congress chooses the one or the other mode of sounding the sentiment of the people in regard to a proposed amendment.

It is the prevailing, though not unanimous, view of writers on the question that a resolution of ratification of an amendment to the Federal Constitution, whether adopted by the legislature or a convention, is irrevocable. This conclusion seems inescapable as to the action of a convention called for the purpose of acting upon an amendment. When it has acted and adjourned, its power is exhausted. Since the "powers and disabilities" of the two classes of representative assemblies mentioned in Article V are "precisely the same," when a legislature, sitting not as a law-

making body, but as such an assembly, has acted upon a proposal for an amendment, it likewise has exhausted its power in this connection.

Logically, this view would accord finality to whatever action was taken, whether by convention or through the legislature. A contrary doctrine, however, to the effect that, while an act of ratification is final and irrevocable, an act of rejection is no obstacle to a subsequent ratification, has made its appearance in academic discussions of the subject. The theory was first advanced during the controversy which attended the adoption of the Civil War Amendments. Those Amendments were proposed during the period of reconstruction, and the question of the standing of the seceded States came under consideration. As early as July, 1861, the Congress had formally declared that, upon the part of the government, the war was being waged "to preserve the Union, with all the dignity, equality and rights of the several States unimpaired." But when that purpose seemed to have been accomplished through victorious armies, men in positions of power and influence took the singular position that the result of the war for the preservation of the Union was the destruction of the Union, and that consequently the seceding States were to be treated as conquered provinces. The governments which had been set up in the Southern States following the Amnesty Proclamation by President Lincoln were declared illegal, and the territory was divided into "military districts," each of which was put under the superintendence and control of a Major General.

[fol. 74-9]

The First and Second Reconstruction Acts were passed in March, 1867, over the vetoes of President Johnson. The first of these Acts recited that "no legal state governments or adequate protection for life or property now exist in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas and Arkansas," thus setting aside the governments which had been organized under Lincoln's Amnesty Proclamation. The Thirteenth Amendment, which was proposed February 1, 1865, had been ratified by many of those governments, to wit: Virginia, Louisiana, Tennessee, Arkansas, South Carolina, Alabama, North Carolina and Georgia. The Fourteenth Amendment, proposed June 16, 1866, was rejected by four of the Southern States in 1866 and by Vir-

ginia in 1867, all acting through legislatures which were parts of the governments set up under the Amnesty Proclamation. Thereafter, these governments were declared by Congress to have been illegal, and the adoption of the Four-
[fol. 74-10] teenth Amendment was accomplished by ratification by the "carpet bag" governments of Georgia, North Carolina and South Carolina, in July, 1868.

The adoption of the Thirteenth Amendment was almost a matter of course following the victory of the Union armies. New Jersey at first rejected this Amendment, but subsequently ratified it. However, its attempt at ratification occurred subsequent to the time when the Amendment had been adopted by three-fourths of the States, and it was not mentioned as one of the ratifying states in the proclamation.

As to the Fourteenth Amendment, at the time of Mr. Seward's first proclamation of its adoption, dated July 20, 1868, there were thirty-seven States in the Union, and the assent of twenty-eight States was required to make the Amendment a part of the Constitution. Twenty-five States ratified and made no attempt to reverse their position. Two States—Ohio and New Jersey—ratified and subsequently undertook to reject the Amendment. North Carolina and South Carolina ratified through their military governments after having rejected the Amendment through their "Amnesty Proclamation" governments. There were, therefore, twenty-nine ratifications, or one more than the number required for adoption of the Amendment. Secretary Seward, however, in his first proclamation, pointed out not only that New Jersey and Ohio had attempted to withdraw their ratifications, but also that in six Southern States (Arkansas, Florida, North Carolina, Louisiana, South Carolina and Alabama) the resolution of ratification had been adopted "by newly constituted and newly established bodies avowing themselves to be, and acting as the legislatures respectively of" those States. He said that it was "deemed a matter of doubt and uncertainty" whether the later resolutions of Ohio and New Jersey were "not irregular, invalid and therefore ineffectual for withdrawing the
[fol. 74-11] consent of the said two States." His proclamation then continued thus:

"And whereas the twenty-three States first hereinbefore named, whose legislatures have ratified the said proposed

amendment, and the six States next thereafter, named, as having ratified the said proposed amendment by newly constituted and established legislative bodies, together constitute three-fourths of the whole number of States in the United States;

"Now, therefore, be it known that I, William H. Seward, Secretary of State of the United States, by virtue and in pursuance of the second section of the Act of Congress approved the twentieth of April, eighteen hundred and eighteen, hereinbefore cited, do hereby certify that, if the resolutions of the legislatures of Ohio and New Jersey ratifying the aforesaid amendment are to be deemed as remaining of full force and effect, notwithstanding the subsequent resolutions of the legislature of those States which purport to withdraw the consent of said States from such ratification, then the aforesaid amendment has been ratified in the manner hereinbefore mentioned and so has become valid to all intents and purposes as a part of the Constitution of the United States."

This proclamation was made on July 20, 1868. Upon its being submitted to the Congress, that body, on the following day, July 21, 1868, adopted a resolution which, after reciting that the twenty-nine States mentioned above had ratified the Amendment, affirmed "that said Fourteenth Article is hereby declared to be a part of the Constitution of the United States and it shall be duly promulgated as such by the Secretary of State." It happened that on that very day Georgia had withdrawn her former rejection of the Amendment and had ratified it and, although this State was not mentioned in the Congressional resolution, it was included in Secretary Seward's second proclamation of July 28, 1868. Thus, at the time of the second proclama- [fol. 74-12] tion, there were ratifications by thirty States, if the Congressional method of counting the vote was correct. That method was to resolve all doubts in favor of ratification. States that had ratified and then rejected and States that had rejected and then ratified were all counted as ratifying.

The ratifications of New Jersey and Ohio were not essential to the adoption of the Amendment, provided the votes of the two Carolinas and of Georgia could be counted on that side. But even with Georgia in the fold, it was still necessary to have either New Jersey or Ohio or one of the

Carolinas. Congress, and Secretary Seward under its instructions, took them all and thus had two more than the required three-fourths.

It was in this tense atmosphere of reconstruction that Judge Jameson wrote his book, and it was from this nonjudicial precedent that he drew the surprising conclusion that consent to an amendment once given, no matter how hastily and inconsiderately, is irrevocable, but that its affirmative rejection, no matter how deliberate or how often repeated, may at any time be overridden. Upon this theory, a proposal for amending the Federal Constitution can never be defeated, since votes of rejection, though affirmative in form and buttressed with statements of the reasons for rejection, are treated as no votes at all, having no more effect than complete inaction on the part of the rejecting State.

The first person to suggest this doctrine was Governor Bramlette, of Kentucky, in his message to the General Assembly of March 1, 1865. The Assembly had rejected the Thirteenth Amendment to the Federal Constitution and sent it to the Governor for his approval or disapproval, conceiving that this was necessary, as in the case of legislation. The Governor, although favoring the Amendment, declined to return the resolution of rejection with his dissent, on the ground that the action of the Legislature was complete without his approval. In his message to that [fol. 74-13] effect, he took occasion to express his dissatisfaction with the action taken by the legislature and his opinion that its rejection did not preclude future ratification, saying: "Nothing but ratification forecloses the right of action. When ratified all power is expended. Until ratified the right to ratify remains."

But it was Judge Jameson who gave wide currency to this view in his work on "The Constitutional Convention." In the first edition of his book he said that, "although the subject (was) not free from difficulties," it was "probable" that Governor Bramlette's view would be accepted as the true construction of Article V, adding (Sec. 563) that:

"it could hardly have been unintentional that the contingency of rejection of the proposed Amendment by one or more States was left unprovided for and it would seem a stretch of power to interpolate into that article a provision

that, if rejected by one legislature or by three-fourths or even all State legislatures, such action should be taken to be definitive."

At the time of the publication of the first edition of Judge Jameson's book, the Fourteenth Amendment had not been proposed by Congress, but, in subsequent editions of his book, he leans heavily upon the action of Congress in accepting the votes of Ohio and New Jersey upon that Amendment, as described above.

So far as concerns the precedent set by Congress in connection with the adoption of the Fourteenth Amendment, its view is authority for the proposition that a State which has once ratified an amendment has exhausted its power and cannot thereafter reverse its stand. On the other hand, when it comes to the counting of the votes of Georgia and the two Carolinas, the avowed justification of this was not that those States could ratify despite their [fol. 74-14] previous rejections, but that their previous rejections were void because the then governments of those States were illegal and their legislatures were without authority to act at all.

The only ground put forward by Judge Jameson in the first edition of his book for the theory that a vote of rejection may be disregarded at any time is that, since Article V does not mention the rejection of a proposal for amendment, but mentions only ratification, it must be concluded that rejections were not in contemplation and consequently were not authorized. The language of Article V is that a proposed amendment shall become part of the Constitution "when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof." Judge Jameson says that it would be "a stretch of power to interpolate into that Article a provision that, if rejected by one legislature or by three-fourths or even all State legislatures, such action should be taken to be definitive." Certainly, had the framers of the Constitution entertained so unique a theory, they would have adopted language more clearly expressing their intention. It is hardly consonant with common sense to say that an amendment, once proposed for ratification, could never be rejected. The very purpose of proposing an amendment must be to poll the sentiment of the various States on the question. It would be an anomaly if that sentiment could be expressed effec-

tively in only one way. We can see no reason for attaching less dignity to the expression of the sovereign will of the State in rejecting an amendment than is attached to its action in ratifying such an amendment. It would be a singular thing to say that rejections are allowed, but when they occur they are to be treated as non-existent. Evidently, the Supreme Court of the United States did not accord with this view when it said, in the National Prohibition Cases, 253 U. S. 350, 386:

[fol. 74-15] "The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification *or rejection* of amendments to it." (Italics ours.)

In a speech delivered in the United States Senate on February 22, 1870, regarding the adoption of the Fifteenth Amendment, Senator Garrett Davis, of Kentucky, in replying to an argument advanced by the Senator from New York, said (Congressional Record, Forty-first Congress, Second Session, p. 1480):

"The honorable Senator's argument upon the first branch of his proposition I thought powerful and conclusive; but when he contended that this power of a State to act upon a proposed amendment to the Federal Constitution was a power to ratify, and imported no power to reject, I think he was widely from the true principle and widely from logic. How long shall it be before a Legislature that has rejected it? How long shall it be an open question? Twenty years? Fifty years? How long? Where is there any principle or provision of the Constitution that would so protract the question before a State convention or State Legislature acting upon the subject of a proposed amendment? There is none. There is not a syllable of language from which such a power can be inferred. It does not exist. When the subject is submitted to a State for its action, whether it be by its Legislature or its convention, it is for a single action; it is but for one action. The action of acceptance is no more extensive than the action of rejection; it has no more validity or effect. The effect of either mode of action is to exhaust the power of the State over that proposed amendment, and it can never come before that State again in any form whatever unless it comes

before it in the form of a new proposition to amend the Constitution."

[fol. 74-16] It is true that Mr. David K. Watson, in his work on the Constitution, Volume II, p. 1318, argues in support of the position that a rejection of an amendment by a State is not final, but may be followed by ratification. He suggests that there is an analogy between the processes of amending the Constitution and that of making laws, and would apply to the former the familiar rule that one legislature may repeal any act of a former legislature. It seems obvious that such an analogy will not hold. Logically, this view would require that no more finality be accorded a ratification than a rejection. As pointed out by Mr. Justice Day in Hawke v. Smith, supra, action taken by a State legislature under the Federal Constitution is not legislation within the proper sense of that word. This is made very clear in an analogous situation presented to the United States Senate concerning the contest over the election of Senator Faulkner of West Virginia in 1887. It may be said in passing that the opinion of the Senate Committee in this matter is likewise a complete answer to appellants' fourth contention set out above.

Mr. Daniel B. Lucas was appointed on March 5, 1887, by the Governor of West Virginia to the seat in the Senate left vacant by the expiration of the term of Senator Johnson N. Camden on March 3, 1887. On December 5, 1887, the President Pro Tempore of the Senate presented the certificate of the appointment to hold the office "until the next meeting of the legislature of said state having authority to fill" the vacancy occasioned by the expiration of Senator Camden's term. On the same day the President Pro Tempore also laid before the Senate the credentials of Charles A. Faulkner, chosen by the legislature of West Virginia a Senator for the term beginning March 4, 1887. Mr. Lucas protested against these latter credentials, and Senator Hoar moved that Mr. Faulkner's case be sent to [fol. 74-17] a committee for investigation, and it was so ordered. The report of this committee may be found in Hinds' Precedents of the House of Representatives, Volume I, Section 632. The report sets out the provision in the Constitution (Article I, Sections 3 and 4) for electing Senators. Section 3 of Article I provides that if vacancies occur while the State legislature is not in session, the Ex-

ecutive may make temporary appointments until the next meeting of the legislature. The report stresses the point that each House shall be the judge as to whether one has the proper credentials to hold his seat. Congress is given the power by the Constitution to prescribe the time and manner of electing Senators, citing the case of Ex Parte Siebold, 100 U. S. 371.

The constitution of West Virginia provided that, "The legislature shall assemble at the seat of government biennially, and not oftener, unless convened by the governor. The first session of the legislature after the adoption of this constitution shall commence on the third Tuesday of November, 1872; and the regular biennial session of the legislature shall commence on the second Wednesday of January, 1875, and every two years thereafter on the same day (Art. VI, Sec. 7)." Article VII, Section 7, is the section that is similar to Section 80 of the present Kentucky Constitution. It reads, "The governor may, on extraordinary occasions convene, at his own instance, the legislature; but, when so convened, it shall enter upon no business except that stated in the proclamation by which it was called together."

Mr. Faulkner was not elected to the Senate until a special session of the legislature was called by the governor, soon after the 5th of March, 1887. This session was called to consider eight specified objects, none of which was the election of a senator. Having set forth the facts, the report then discusses two questions arising in the case.

[fol. 74-18] First, as to the action of the legislature. Was the body which sat in pursuance of the governor's call a legislature in the constitutional sense? Mr. Lucas claimed that since it was not called to elect a Senator, if it did elect a Senator then it was not a legislature, for it was violating the Constitution of the State. However, the Senate committee did not agree with this argument, for, it pointed out, the body passed upon legislation concerning the eight specified objects, as a legislature, and it could surely pass upon a matter or duty imposed upon it by the Constitution of the United States, which is the supreme authority of the land. It points out that where the State Constitution conflicts with the Federal Constitution, the latter must prevail. To the first question, the committee held that the special session of the legislature could elect Mr. Faulkner even though such an election was not one of the purposes for calling same.

The second question was as to the qualifications of Mr. Faulkner. The issue on this point is not pertinent here.

The report, which was evidently written by Senator Hoar, an able constitutional lawyer, says:

"It is claimed by Mr. Lucas that, as this body was not permitted to enter upon any legislative business except such as related to the eight matters set forth in the call, it was not a legislature, but was a body deriving its power from the will of the executive, and so was exerting a certain executive or quasi-executive function something like that which is exercised by the Senate in giving its assent to the nomination of public officers.

"But it seems to us that this view cannot be supported. In the first place, the body is expressly declared by the constitution of West Virginia itself to be a legislature. In the next place, the function which it exercised in making [fol. 74-19] enactments upon the eight great subjects mentioned in the call of the governor is clearly a legislative function. • • •

"It is difficult to conceive of any definition of the word 'legislature' which would not include a body capable of passing and actually passing such enactments as these (subjects in call). They can be binding on the people of the Commonwealth only as legislation. They would be subject to be construed and enforced by the courts of that State only in their character as laws.

"But it seems to the committee that the construction of the State constitution upon which the above argument is based, is one which will not bear examination. When that constitution provided that the legislature so convened in extraordinary occasions 'should enter upon no business except that stated in the proclamation by which it was called together,' the people must be presumed to have had in mind business to be transacted under authority of the State constitution, and not to have intended to prohibit the performance of duties imposed upon it by the supreme authority of the Constitution of the United States.

"If the argument be sound that a legislative body which is prohibited from entering upon certain classes of business, or which is confined to certain classes of business clearly legislative in their character, is no legislature in the constitutional sense, its logic would require us to declare that the legislature of every State whose bill of rights excludes

it from large domains of legislation is no legislative body. If, under the same provision of the Constitution of the United States, the act of Congress had fixed a day for holding elections for Representatives to Congress, and the State Constitution or laws should prohibit the assembling of the people for such elections on the day so fixed, it would, we suppose, be held clear that the act of the State would be void and the authority of the act of Congress would prevail.

"We cannot see any difference between such prohibition of a State constitution applicable to the constitutional electors of Senators, who are members of the State legislature, [fol. 74-20] and the constitutional electors of representatives, who are a body of electors authorized to vote for members of the most numerous branch of the State legislature.

"We are therefore clearly of the opinion that the election of Mr. Faulkner at the special session of the legislature of West Virginia was valid."

If further authority is necessary to rebut the theory of Mr. Watson that there is an analogy between the action of the State legislature in performing its functions under the Federal Constitution and ordinary legislation, we find it in the cases cited by appellees for the following proposition quoted from their brief:

"The ratification of a proposed amendment to the Federal Constitution by the State Legislature *is not legislation* and does not require any previous proclamation for consideration and action, if the Legislature is in fact in session, whether General or Special". (Italics ours.)

Appellees refer to the following cases supporting this proposition:

Leser v. Garnett (1922), 258 U. S. 130, 42 S. Ct. 217.
National Prohibition Cases, 253 U. S. 350, 386, 40 S. Ct. 486.
State v. Sevier (1933), 333 Mo. 662, 66 S. W. (2d) 895.
State v. Sevier (Certiorari denied), 54 S. Ct. 132.
Pryor v. Nolan, 68 Colo. 286, 188 P. 729, 731.
Opinions of Justices, 118 Me. 544, 107 Atl. 673.

We think the conclusion is inescapable that a State can act but once, either by convention or through its legislature, upon a proposed amendment; and, whether its vote be in

the affirmative or be negative, having acted, it has exhausted its power further to consider the question without a resubmission by Congress. If we should be in error in this conclusion—and, of course, our position on this question [fol. 74-21] must bow to the views of the Supreme Court of the United States when they are expressed thereon—there are nevertheless the additional questions as to whether or not rejection by more than one-fourth of the States at one time did not terminate the "offer" of the Amendment by Congress, and whether or not, under the decision of the Supreme Court in Dillon v. Gloss, supra, more than a reasonable time had elapsed between the submission of the Amendment and the alleged ratification by Kentucky. Accepting the analogy between the submission of an amendment by Congress and the making of an offer, under the principles of the law of contracts, the conclusion that the Amendment was no longer before the States at the time of the purported ratification by Kentucky in 1937 seems inevitable. The proposition is succinctly stated in a letter published in the July, 1934, number of the American Bar Association Journal, written by Mr. Frank W. Grinnell, of the Boston bar. He says:

"Since the Constitution requires a vote of three-fourths of the several states to ratify an amendment, it requires only one state more than one-fourth to defeat ratification and it seems to follow as a matter of common sense and orderly procedure from the decision just referred to (Dillon v. Gloss) that the rule must work both ways and that when thirteen states (one more than one-fourth of the forty-eight states) have voted not to ratify an amendment it is no longer pending, but is defeated until Congress sees fit to resubmit it. Otherwise, a state could change its mind in one direction after a final vote of the necessary number of states, but not in the other direction.

"In the case of the Child Control Amendment, not only thirteen but twenty-six states voted not to ratify. I submit that it was clearly defeated. If this is not so, states might be subjected to constant agitations over defeated [fol. 74-22] amendments after the citizens considered them defeated and w[illegible] off their guard.

"When an amendment is submitted by Congress, the process of ratification is really a debate among the several states. If it is true, as I believe it to be, that at this time

the Child Control Amendment is no longer before the states, the action of those states which have attempted to ratify it during 1933 has no legal effect.

. . . . . .

"If we are to have deliberative government in this country on such important matters as amendments to the Constitution of the United States, is it not essential that we should maintain the rules of orderly procedure similar to those in our legislatures under which after a matter has been definitely defeated by the requisite majority it can not be considered again unless it is resubmitted in the usual way,—in this case by Congress."

In addition to the fact that the Amendment before us was rejected by more than one-fourth of the States—indeed, it appears from the record that twenty-one of the States in 1926 had not only rejected the Amendment, but the resolutions thereon were duly certified to the Secretary of State of the United States, and thirty-seven States in all had actually rejected—there is the question, noted in Dillon v. Gloss, supra, from which we have quoted above at length, of whether or not more than a reasonable time has elapsed since the original submission of the Amendment. Assuming that the rejection of the Amendment by more than one-fourth of the States did not ipso facto terminate the proposal and require a resubmission by Congress if further action was to be taken, it may at the very least be doubted if twelve and a half years is a reasonable time within which to act. Leaving out of consideration the first ten Amendments to the Constitution (the "Bill of Rights"), the time required for the adoption of the eleven succeeding Amendments was respectively as follows:

[fol. 74-23] Eleventh: 2 years, 4 months.
Twelfth: 9 months.
Thirteenth: 10 months.
Fourteenth: 2 years, 1 month.
Fifteenth: 1 year, 1 month.
Sixteenth: 3 years, 6 months.
Seventeenth: 1 year, 2 weeks.
Eighteenth: 1 year, 1 month.
Nineteenth: 1 year, 2 months.
Twentieth: 11 months.
Twenty-first: 9 months, 2 weeks.
Average Time: 1 year, 6 months.

Since the decision in Dillon v. Gloss, supra, two proposals for amending the Constitution (since adopted as the Twentieth and Twenty-first Amendments) each contained a limitation of seven years. The power of Congress thus to fix a reasonable limitation upon the time within which an amendment should remain before the States having been sustained in Dillon v. Gloss, and Congress having attached a limitation of seven years to its submission of both the Twentieth and Twenty-first Amendments, it does not seem improper to conclude that this is the period considered by that body to represent a reasonable time for the States to act. Certainly, seven years is not too short a time, in view of the history of previous amendments as shown in the table above. Taking the instant Amendment itself, action had been taken in forty-two of the forty-eight States by the close of 1927. The fact that but one State (Colorado in 1931) acted between 1927 and 1933 indicates very strongly that general sentiment considered the proposition to be no longer before the people. It seems clear that the "reasonable time" during which the "offer" remained open necessarily expired at some time during the period of apparent abandonment between the end of 1927 and the revival of interest in 1933. Certainly, by any yardstick, more than a reasonable time had elapsed by January, 1937.

[fol. 74-24] Concluding, as we must, that the petition in this case has stated a cause of action, we are nevertheless confronted with the proposition urged on behalf of appellees to the effect that, since the Governor's certification to the Secretary of State of the United States is fait accompli, the case is moot to the extent that the Court can grant no effective relief, even though it should proceed to make a declaration of rights under Civil Code Section 639a, et seq. Appellants justify the procedure which they have adopted in presenting the question as to the validity of the Amendment under the decision of the Supreme Court of the United States in Leser v. Garnett, 258 U. S. 130, 42 S. Ct. 217, 66 L. Ed. 505, to the effect that an official notice to the Secretary of State, duly authenticated, that the legislature of a given State had adopted a resolution of ratification of a proposed amendment to the Federal Constitution, is "conclusive on him" and that his proclamation certifying that he had received such notices from three-fourths of the States and that the Amendment in question had therefore become a part of the Federal Constitution is "conclusive upon the courts."

Under this decision, the claimed ratification of an amendment cannot be challenged after the proclamation by the Secretary of State of the United States. Obviously, therefore, if there is to be a judicial determination of the validity of the action taken by any State, it must occur during the interim following the action by such State and the date of proclamation by the Secretary. It is not questioned but that the Governor acted in a purely ministerial capacity in forwarding the certified copy of the resolution of the General Assembly, and it has been held that the Secretary of State acts ministerially in proclaiming an amendment under Section 205 of the Revised Statutes of the United States (U. S. C. A., Title 5, Section 160). United States v. Colby, 265 Fed. 998, 49 App. D. C. 358 (a writ of error dismissed, [fol. 74-25] 257 U. S. 619). The Amendment becomes effective upon its ratification by the thirty-sixth State and does not await a proclamation by the Secretary of State to give it vitality. Dillon v. Gloss, supra. It is apparent, therefore, that the action of the Governor in forwarding the resolution of the General Assembly to the Secretary of State did not of itself add anything to the action of the General Assembly other than to make a record which was prima facie evidence of the action taken by Kentucky. It would be surprising to learn that a Governor might irrevocably commit his State to the adoption or rejection of a constitutional amendment by a mere certification to the Secretary of State. We do not think that such a rule is to be implied from the decision in Leser v. Garnett, supra. Section 205 of the Revised Statutes of the United States (U. S. C. A., Title 5, Section 160) provides:

"Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, *according to the provisions of the Constitution,* the Secretary of State shall forthwith cause the amendment to be published, with his certificate, *specifying the states by which the same may have been adopted,* and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States." (Italics ours.)

Surely, the Secretary of State must determine whether or not the certification by the Governor is "according to the provisions of the Constitution." If, as we conceive, the

Amendment was no longer before the States at the time of the purported adoption by the General Assembly of Kentucky, then the certification by the Governor was a nullity and could and should be ignored by the Secretary of State. [fol. 74-26] If the certificate of the Governor showing the purported ratification by the State of Kentucky cannot be impeached, then, by the same token, the certificate of the Governor to the resolution of rejection, passed in 1926, and thereafter duly forwarded to the Secretary of State, is likewise not subject to question, and it would therefore be the duty of the Secretary of State to ignore the second certification. In both Leser v. Garnett, supra, and United States v. Colby, supra, the official notices in the Department of State were apparently regular in form and unchallenged at the time when the proclamation of the Secretary was made. It was held that those notices had created a presumption conclusive upon the Secretary of State that the legislatures of the States from which they came had duly adopted resolutions of ratification. Certainly this presumption would attach to the record of rejection no less than the subsequent record of purported ratification, and it seems clear that a decision by a court having jurisdiction of the question would be binding as to the validity or invalidity of the record concerning a particular State.

In Miller v. Johnson, 92 Ky. 589, 18 S. W. 522, certain voters and taxpayers, suing on behalf of themselves and others similarly interested, brought an action against the public printer and the Secretary of State to enjoin the former from printing the State Constitution just promulgated by the Constitutional Convention of 1891 and the latter "from preserving it in the State archives as the Constitution of the State; and also asked that it be adjudged not to be such, but spurious and invalid." In determining that case, the Court said:

It is urged upon the part of the appellees, that the appellant's suit is based upon a speculative idea of injury; and that no such special, particular and substantial damage is impending to them as to authorize it. Also that the action [fol. 74-27] does not lie against the appellees because the printing or preservation of the instrument will not add to or detract from its validity. We waive the consideration of these objections, because even if entitled to it, the importance of this controversy to the State requires a decision upon the merits."

Appellees have waived any question as to the right of the appellants to maintain this suit. Board of Park Commissioners v. Speed, 215 Ky. 319, 285 S. W. 212, and, aside from this, "the importance of this controversy to the State requires a decision upon the merits." The fact that the Governor certified the resolution to the Secretary of State after this suit was filed did not deprive the courts of the jurisdiction already attached to determine the controversy and to make a declaration of rights under Civil Code, Section 639a et seq. McHugh v. Louisville Bridge Co., 23 Ky. Law Reporter, 1546, 65 S. W. 456; St. L. & S. F. R. Co. v. Cross: 171 Fed. 480; 32 C. J. 77.

In 32 C. J. 24 the text, supported by numerous authorities, says:

"Where defendant has fully completed the act sought to be restrained, after the filing of the bill but before the issuance of any order or decree, the court has power to compel by mandatory injunction the restoration of the former condition of things, and thereby prevent the gaining of an advantage by reason of the wrongful act, provided plaintiff has been guilty of no wrongful acquiescence or delay. Where defendant does an act which the bill seeks to enjoin, he acts at his peril and is subject to the power of the court to compel a restoration of the status, or to grant such other relief as may be proper under the particular circumstances of the case."

Under the circumstances here presented, a mandatory order directing the Governor to notify the Secretary of [fol. 74-28] State of the decision of this Court would be entirely unnecessary. The Court itself, with equal effect, may direct its clerk to certify a copy of its judgment concerning the status of the Amendment without the necessity of directing action by a co-ordinate branch of the State Government.

Since the question is before us on demurrer to the petition, and appellees may desire to assert some further defense, the case will have to be returned to the Circuit Court with directions to overrule the demurrer to the petition, and for such further proceedings as are not inconsistent with the views herein expressed.

Judgment reversed.

Whole Court sitting.

[fols. 75-76] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed March 10, 1938

To the Clerk of the Above Entitled Court:

You are hereby requested to make a transcript of the record of this cause to be used in an application to the Supreme Court of the United States for a writ of Certiorari in said cause, the transcript will consist of:

The record on appeal in said cause;

The opinion of the Court of Appeals of Kentucky;

All journal entries contained in the records and proceedings of the Court of Appeals of Kentucky relating to said cause;

The final judgment and decision of the Court of Appeals of Kentucky in said cause;

The judgment and decision of the Court of Appeals of [fol. 77] Kentucky in the cause styled Wise, et al. v. Chandler, et al., decided October 1, 1937, which shall be attached as an appendix to your record;

A copy of this Præcipe;

Your certificate to the record that it is a complete record in said cause.

Dated this 10th day of March, 1938.

J. W. Jones, Assistant Attorney General, Attorney for Appellants.

[fol. 78] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 79] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME—Filed March 17, 1938

Upon consideration of the application of counsel for the petitioners it is ordered that the time for filing a petition for writ of certiorari in the above-entitled cause is extended to and including March 31st, 1938.

J. C. McReynolds, Associate Justice of the Supreme Court of the United States.

Dated this 17th day of March, 1938.

[fol. 80] [File endorsement omitted.]

[fol. 81] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 11, 1938.

The petition herein for a writ of certiorari to the Court of Appeals of the Commonwealth of Kentucky is granted, and the case is assigned for argument immediately following No. 796.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 30 1938
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. [redacted] 14

ALBERT BENJAMIN CHANDLER, INDIVIDUALLY AND AS GOVERNOR OF THE COMMONWEALTH OF KENTUCKY, ET AL.,
Petitioners,

vs.

JAMES W. WISE AND RAY B. MOSS.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY.

J. W. JONES,
Assistant Attorney General of Kentucky,
Counsel for Petitioners.

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Johnson, Lieutenant Governor of the Commonwealth of Kentucky, and the President of the Senate of the General Assembly of Kentucky; Charles D. Arnett, Secretary of State of the Commonwealth of Kentucky; John Kirtley, Speaker of the House of Representatives of the General Assembly of Kentucky; William A. Perry, Chief Clerk of the Senate of the General Assembly of Kentucky, and Brooks Hargrove, Chief Clerk of the House of Representatives of the General Assembly of Kentucky, respectfully present to this Court their petition for a writ of certiorari addressed to the Court of Appeals of Kentucky commanding said court and the clerk thereof to certify to this Court the record and proceedings of the case in said court wherein your Petitioners were the appellants, and the respondents, James E. Wise and Ray B. Moss, were the respondents, together with its opinion therein and also its opinion in the case wherein your petitioners were the respondents, and the respondents herein, James E. Wise and Ray B. Moss, were the appellants for the review and determination of said cause by this Court.

The reasons relied on for the issuance of said writ and upon which your petitioners believe that a writ ought to be issued are as follows:

First. The Court of Appeals of Kentucky misinterpreted Article 5 of the Constitution of the United States (a) in holding that where a proposed amendment to the Federal Constitution has been rejected by more than one-fourth of the States, and the rejections have been duly certified to the Secretary of State of the United States, a State may not thereafter ratify the proposed amendment; (b) in holding that the Kentucky Legislature in rejecting the proposed Child Labor Amendment to the Federal Constitution exhausted its power further to consider said proposed amendment without a resubmission thereof by Congress;

(c) in holding that the proposed Child Labor Amendment to the Federal Constitution was no longer before the people of the United States because of the expiration of a reasonable time since said proposed amendment was submitted by Congress; (d) in holding that the ratification by the Kentucky Legislature of the proposed Child Labor Amendment was invalid.

Second. Substantial Federal questions have been decided by final judgment of the Court of Appeals of Kentucky.

Third. In the case of *Rolla W. Coleman et al.* v. *Clarence W. Miller, Secretary of the Senate of the State of Kansas, et al.*, 71 Pac. (2d) 518, the Supreme Court of the State of Kansas adjudged the same Federal questions involved in this case *contra* to the adjudgment thereof by the Court of Appeals of Kentucky. This conflict in decisions relative to substantial Federal questions should be determined by this Court.

Fourth. The Federal questions involved herein have not been determined by this Court; they are very important to the people of the United States, and a determination of said questions should be made by this Court as soon as possible.

In their behalf, your petitioners state the following facts:

The respondents herein, as citizens and taxpayers of the Commonwealth of Kentucky of the United States of America, brought this action against your petitioners on January 15, 1937, in the Franklin Circuit Court in Frankfort, Kentucky, to have declared invalid the action of the Senate of the Kentucky Legislature on January 12, 1937, and the action of the House of Representatives of the Kentucky Legislature on January 13, 1937, adopting a resolution purporting to ratify the proposed Child Labor Amendment to the Constitution of the United States, which was

submitted to the people of the United States by Congress on January 2, 1924, and which was affirmatively rejected by the Kentucky Legislature on March 24, 1926. An injunction was asked for against your petitioners to restrain them from sending certified copies of said resolution to the Secretary of State of the United States and to the presiding officer of the United States Senate, and to the Speaker of the House of Representatives of the United States, or any of them, and to enjoin your petitioners from notifying in any manner the Secretary of State of the United States of the adoption by the Kentucky Legislature of said resolution. Thereafter the respondents herein amended their petition, and asked that a mandatory injunction be issued against your petitioner Albert Benjamin Chandler, Governor of the Commonwealth of Kentucky, to require him to notify forthwith the Secretary of State of the United States that at the time your said petitioner sent attested copies of said resolution to the Secretary of State of the United States the validity of the adoption of said resolution had been challenged, and that prior to the receipt of said copies by the Secretary of State of the United States your said petitioner had been restrained by an order of court from giving notice in any manner to the Secretary of State of the United States of the adoption of said resolution, and that any notice given in violation of said restraining order was null and void. Thereafter the respondents herein amended their petition, and asked for a mandatory injunction against your petitioners Albert Benjamin Chandler, individually and as Governor of the Commonwealth of Kentucky, and Charles D. Arnett, individually and as Secretary of State of the Commonwealth of Kentucky, requiring them to notify the Secretary of State of the United States that said resolution theretofore certified by them to the Secretary of State of the United States was void and of no effect. Your petitioners filed a general demurrer to the respondents'

petition and the same as amended. The general demurrer was sustained by the circuit court. Thereupon the respondents herein appealed to the Court of Appeals of Kentucky, and obtained a reversal of the judgment of the lower court. See R. page 28; see *Wise et al.* v. *Chandler et al.*, 108 S. W. (2d) 1024, 270 Ky. 1. Upon filing the mandate of the Court of Appeals of Kentucky with the Franklin Circuit Court an order was entered pursuant to said mandate overruling the general demurrer of your petitioners. Thereupon your petitioners declined to plead further, and judgment was entered adjudging (a) that the respondents herein had the right to maintain this action; (b) that the adoption by the Legislature of Kentucky of said resolution did not operate to ratify said proposed amendment; (c) that notice given by your petitioner Albert Benjamin Chandler, Governor of the Commonwealth of Kentucky, to the Secretary of State of the United States that the Legislature of Kentucky had ratified said proposed amendment was of no effect; (d) that the Clerk of the Franklin Circuit Court be directed to give official notice to the Department of State of the United States that said resolution was and is invalid; that the proposed amendment has not been ratified by the Legislature of Kentucky according to the provisions of the Constitution of the United States, and the notice given by your petitioner Albert Benjamin Chandler, Governor of the Commonwealth of Kentucky, to the Secretary of State of the United States notifying him of the adoption of said resolution was and is of no effect. After the entry of said judgment your petitioners appealed therefrom to the Court of Appeals of Kentucky, which court affirmed the judgment of the circuit court.

Your petitioners are advised that said second decision of the Kentucky Court of Appeals is a final judgment, and is erroneous.

We have hereinbefore set out the errors which we claim were committed by the Court of Appeals of Kentucky in deciding this case. The rejection of a proposed amendment to the Federal Constitution by more than one-fourth of the States does not operate to defeat the proposed amendment because such action by the stated number of States does not have any effect on our Federal Constitution. Each State, including the fourteen States that have rejected the proposed amendment, remains free to take whatever action it desires with respect to the proposed amendment.

Article V of the Federal Constitution is as follows:

> "The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress, provided that no amendments which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

In first rejecting the proposed Child Labor Amendment the Kentucky Legislature did not exhaust its power further to consider said proposed amendment. Jameson's Constitutional Convention (4th Edition), Sections 578-581. When the thirty-sixth State has ratified, either by action of its legislature or by convention, a proposed amendment to our Federal Constitution, the amendment process has been completed and the proposed amendment then becomes a part of our Federal Constitution. Until the thirty-sixth State has

so acted, any State which has previously acted with respect to the proposed amendment, either in the ratification or the rejection thereof, is free to reconsider the proposed amendment and take such subsequent action with respect thereto as it desires.

Congress has proposed the Child Labor Amendment without any limitation as to time of ratification thereof. The Court of Appeals of Kentucky erred in holding that the proposed amendment was no longer before the people because of the expiration of a reasonable time since the submission thereof by Congress. *Dillon* v. *Glass*, 256 U. S. 368.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued under the seal of this Court, directed to the Court of Appeals of Kentucky, at Frankfort, Kentucky, commanding the said court to certify and send to this Court on the day to be designated, a full and complete transcript of the record, and all proceedings of the said Court of Appeals of Kentucky had in said cause, to the end that the said cause may be reviewed and determined by this Honorable Court as provided by law, and that the said judgment of the Court of Appeals of Kentucky be reversed by this Honorable Court, and for such further relief as may seem proper.

J W JONES,
Assistant Attorney General
of the Commonwealth of Ky.,
Counsel for Petitioners.

COMMONWEALTH OF KENTUCKY,
County of Franklin:

J. W Jones, Assistant Attorney General of the Commonwealth of Kentucky, being first duly sworn, says that he is the counsel for the petitioners in the foregoing peti-

tion; that he has read the foregoing petition and knows well the contents thereof; that he has also carefully read and studied a duly certified copy of the transcript of record which accompanies the petition herein, being the transcript of record in the case at bar; that the matters in said petition are, in the judgment of this affiant, duly supported in and by said transcript of record, and that he knows of the above proceedings had, and that the acts in said petition herein stated are true to the best of his knowledge and belief.

J W JONES,
Assistant Attorney General
of the Commonwealth of Ky.

Subscribed and sworn to before me by J W Jones, Assistant Attorney General of the Commonwealth of Kentucky, this the 11th day of March, 1938.

My commission as notary public will expire September 17, 1941.

FORREST MILLER,
Notary Public, Franklin County, Kentucky.

I do hereby certify that I have carefully examined the foregoing petition for a writ of certiorari, and the allegations thereof are true as I verily believe, and, in my opinion, is well founded, and the case is one in which the prayer of the petition should be granted by this Court.

J W JONES,
Assistant Attorney General
of the Commonwealth of Ky.,
Counsel for Petitioners.

FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 28 1938
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 14

Albert Benjamin Chandler, Individually and as Governor of the Commonwealth of Kentucky, et al., ... Petitioners

vs.

James W. Wise and Ray B. Moss, . . Respondents

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR PETITIONERS

GUY HERDMAN
and
J W JONES,
Assistant Attorneys General of the Commonwealth of Kentucky, Frankfort, Ky.

Attorneys for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 14

ALBERT BENJAMIN CHANDLER, Individually and as Governor of the Commonwealth of Kentucky; KEEN JOHNSON, Lieutenant Governor of the Commonwealth of Kentucky, and the President of the Senate of the General Assembly of Kentucky; CHARLES D. ARNETT, Secretary of State of the Commonwealth of Kentucky; JOHN KIRTLEY, Speaker of the House of Representatives of the General Assembly of Kentucky; WILLIAM A. PERRY, Chief Clerk of the Senate of the General Assembly of Kentucky, and BROOKS HARGROVE, Chief Clerk of the House of Representatives of the General Assembly of Kentucky, ... *Petitioners*

vs.

JAMES W. WISE and RAY B. MOSS, ... *Respondents*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR PETITIONERS

JURISDICTION

Subsection (b) of Section 344, Title 28, of the Judicial Code, provides in part as follows:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it

for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgement or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, * * * and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

In their petition filed in the Franklin Circuit Court, Frankfort, Kentucky, the respondents herein specially set up and claimed as follows:

"The aforesaid action of the General Assembly of Kentucky in attempting to revoke its previous action in rejecting the proposed Child Labor Amendment and in attempting to ratify said proposed amendment was and is unlawful and violative of the Constitution and laws of the United States * * *.

"The General Assembly of Kentucky having duly rejected said proposed amendment, could not subsequent thereto legally reconsider and adopt said proposed amendment without violating Article 5 of the Constitution of the United States and said action in attempting to reconsider and adopt said proposed amendment violated Article 5 of the Constitution of the United States because said action was not taken within a reasonable time after the amendment was proposed on June 2, 1924, by the Congress of the United States. * * *

"The plaintiffs are without adequate remedy at law in the premises and only by a suit of this nature and by the injunctive process of this court can they be fully protected, as citizens and taxpayers of the Commonwealth of Kentucky and the United States, from the illegal and void action of the General Assembly of Kentucky." (Transcript of Record, pp. 4-5)

In its first decision in this case the Court of Appeals of Kentucky stated:

> "We think the conclusion is inescapable that a State can act but once, either by convention or through its legislature, upon a proposed amendment; and, whether its vote be in the affirmative or be negative, having acted, it has exhausted its power further to consider the question without a resubmission by Congress. If we should be in error in this conclusion—and, of course, our position on this question must bow to the views of the Supreme Court of the United States when they are expressed thereon—there are nevertheless additional questions as to whether or not rejection by more than one-fourth of the States at one time did not terminate the 'offer' of the amendment by Congress, and whether or not, under the decision of the Supreme Court in Dillon v. Gloss, supra, more than a reasonable time had elapsed between the submission of the Amendment and the alleged ratification by Kentucky. Accepting the analogy between the submission of an amendment by congress and the making of an offer, under the principles of the law of contracts, the conclusion that the Amendment was no longer before the States at the time of the proposed ratification by Kentucky in 1937 seems inevitable. * * * (Transcript of Record, pp. 49-50)
>
> "* * * It seems clear that the 'reasonable time' during which the 'offer' remained open necessarily expired at some time during the period of apparent abandonment between the year 1927 and the revival of interest in 1933. Certainly, by any yardstick, more than a reasonable time had elapsed by January, 1937." (Transcript of Record, p. 52)

The decision of the Court of Appeals of Kentucky with respect to the foregoing matters was affirmed by that Court in its second opinion wherein the Court said:

> "No issue or additional question is presented on this appeal, and the court has not changed its view

on any of the questions formerly presented, including those raised under the Federal Constitution." (Transcript of Record, p. 33)

It will be seen from the foregoing quotations from the petition and the opinion of the Court of Appeals of Kentucky that a right under the Constitution of the United States was set up and claimed by the respondents herein, and said matter was adjudicated by a final judgment (Transcript of Record, p. 33). The very essence of this case is a Federal controversy. The matter in controversy is of such great importance to the people of the nation that a final adjudication thereof should be made by this Court. St. L. & Iron Mtn. Ry. v. McWhirter, 229 U. S. 265; Swafford v. Templeton, 185 U. S. 487.

The matter in controversy herein is justiciable. Ellingham v. Dye, 99 N. E. 1 (Ind.)

STATEMENT OF CASE

On June 2, 1924, the Congress of the United States proposed the Child Labor Amendment to the states of the Union, and prescribed ratification by the legislatures of the several states as the mode of ratification. On March 24, 1926, the Kentucky Legislature affirmatively rejected the proposed amendment. On December 23, 1936, the Governor of Kentucky issued a proclamation convening the Legislature in Special Session on the same day for the purpose of considering specified subjects which did not include the proposed amendment. The Governor amended his proclamation on January 8, 1937, by adding the ratification of the proposed amendment to the previously specified subjects to be considered by the Legislature. On January 13, 1937, the Legislature adopted a joint resolution purporting to ratify the proposed amendment.

This suit was instituted by the respondents as citizens and taxpayers of Kentucky and the United States by filing a petition in the Franklin Circuit Court, Frankfort, Kentucky, on January 15, 1937, against the petitioners herein to have declared invalid the action of the Legislature on January 13, 1937, purporting to ratify the proposed amendment. The respondents herein sought an injunction against the petitioners to restrain them from sending certified copies of the joint resolution to the Secretary of State of the United States, the presiding officer of the United States Senate, and the Speaker of the House of Representatives of the United States, of any of them, and to enjoin the petitioners from notifying the Secretary of State of the United States of the adoption by the Kentucky Legislature of said resolution. Before a copy of the restraining order was served on the Governor, he mailed attested copies of the resolution to the Secretary of State of the United States. Thereafter the respondents amended their petition by asking for a mandatory injunction against the Governor to compel him to notify forthwith the Secretary of State of the United States that at the time he mailed attested copies of the resolution to the Secretary of State of the United States the validity of the adoption of said resolution had been challenged; and that prior to the receipt of said copies by the Secretary of State of the United States the Governor had been restrained by an order of court from giving notice in any manner to the Secretary of State of the United States of the adoption of said resolution, and that any notice given in violation of said restraining order was null and void. Thereafter the respondents amended their petition, and asked for a mandatory injunction against Albert Benjamin Chandler, individually and as Governor of the Commonwealth of Kentucky, and Charles D. Arnett, individually and as

Secretary of State of the Commonwealth of Kentucky, two of the petitioners herein, requiring them to notify the Secretary of State of the United States that said resolution theretofere certified by them to the Secretary of State of the United States was void and of no effect. The petitioners herein filed a general demurrer to the respondents' petition and the same as amended. The general demurrer was sustained by the Circuit Court. Thereupon the respondents appealed to the Court of Appeals of Kentucky and obtained a reversal of the judgment of the trial court. Upon filing the mandate of the Court of Appeals of Kentucky with the trial court an order was entered pursuant to said mandate overruling the general demurrer of the petitioners. Thereupon the petitioners herein declined to plead further, and judgment was entered adjudging (a) that the respondents herein had the right to maintain this action; (b) that the adoption by the Legislature of Kentucky of said resolution did not operate to ratify said proposed amendment; (c) that notice given by the Governor to the Secretary of State of the United States that the Legislature of Kentucky had ratified said proposed amendment was of no effect; (d) that the Clerk of the Franklin Circuit Court be directed to give official notice to the Department of State of the United States that said resolution was and is invalid; that the proposed amendment has not been ratified by the Legislature of Kentucky according to the provisions of the Constitution of the United States, and the notice given by the Governor to the Secretary of State of the United States notifying him of the adoption of said resolution was and is of no effect. After the entry of said judgment, the petitioners herein appealed therefrom to the Court of Appeals of Kentucky, which Court affirmed the judgment of the Circuit Court. This Court having granted a petition for a writ of certiorari to the Court of Appeals

of Kentucky, the case is now here for review and determination.

ASSIGNMENT OF ERRORS

The assignment of errors herein follows:

The Court of Appeals of Kentucky erred in holding:

(1) That the Kentucky Legislature, in rejecting the proposed Child Labor Amendment, exhausted its power further to consider the proposal.

---

*Action on Child Labor Amendment by State Legislatures as Shown by Records of U. S. Department of State

Year	No. of States Voting		No. Included as Ratifying Which Had Previously Rejected	Record at End of Each Year	
	To Reject	To Ratify		States Rejecting	States Ratifying
1924	3	1	....	3	1
1925	19	3	....	22	4
1926	2	....	....	24	4
1927	1	1	....	25	5
1928	....	....	....	25	5
1929	....	....	....	25	5
1930	....	....	....	25	5
1931	....	1	....	25	6
1932	....	....	....	25	6
1933	....	14	5	20	20
1934	....	....	....	20	20
1935	1	4	3	18	24
1936	....	....	....	18	24
1937	....	3	2	16	27

(2) That rejection of the proposed Child Labor Amendment by more than one-fourth of the states operated to defeat and terminate the proposal.

(3) That at the time the Kentucky Legislature attempted to ratify the proposed Child Labor Amendment on January 13, 1937, said proposal was not before the people because of the expiration of a reasonable time for ratification since submission thereof by the Congress.

(4) That the attempted ratification of the proposed Child Labor Amendment by the Kentucky Legislature on January 13, 1937, was invalid.

SUMMARY OF ARGUMENT

1. REJECTION OF THE PROPOSED AMENDMENT BY THE LEGISLATURE DID NOT EXHAUST THE LEGISLATURE'S POWER WITH RESPECT TO THE RATIFICATION OF THE AMENDMENT

The power to reject a proposed amendment is not a delegated power, but is one which inheres in the legislature, is of a continuing nature, and may be exercised at the will of the legislature as often and as many times as the legislature desires before the proposed amendment is finally ratified.

2. REJECTION OF THE PROPOSED AMENDMENT BY MORE THAN ONE-FOURTH OF THE STATES DID NOT DEFEAT THE PROPOSAL.

As rejection of the proposed amendment by the legislature is not binding on the legislature, such rejection by more than one-fourth of the states cannot operate to defeat the proposed amendment.

3. THE PROPOSED AMENDMENT HAD NOT TERMINATED AT TIME OF RATIFICATION BY THE KENTUCKY LEGISLATURE BECAUSE OF THE EXPIRATION OF REASONABLE TIME

The amendment to the Federal Constitution was intended by the framers thereof to be a slow process. The procedure of amendment was designed to require a considerable time for the completion of the amending process. In computing the period of time to terminate the pendency of a proposed amendment, only such time as expired between consecutive actions by two legislatures or since the last action of any legislature should be considered. Three years is the longest period of time that has expired between any two consecutive actions of legislatures with respect to the proposed amendment. Three years cannot be considered as such period of time as will bar the exercise of the legislative power to ratify a proposed amendment.

ARGUMENT

(1) Ratification of the Proposed Amendment Did Not Preclude Further Action of the Legislature

Amendment of the Federal Constitution is governed by Article V thereof, which is as follows:

> "The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress, provided that no amendments which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

A consideration of the history of this Article of the Constitution might be helpful to an understanding of its meaning. Before we had a Federal constitution, we had constitutions of the original Colonies. Six of the first thirteen state constitutions framed provided for their future revision. This feature was without precedent in other countries. It was designed to add stability and continuity to government. By 1787 the number of state constitutions providing for their alteration had increased to eight. Three of the constitutions vested the amending power in the general assemblies. The other five provided that revision could be made by convention of the people.

Article Thirteen of the Articles of Confederation, which became effective March 1, 1781, provided that:

> "the articles of this Confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration, at any time hereafter, be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every state."

This strict requirement for the amendment of the Articles contributed largely to the failure of the Confederation.

The Federal Convention met in May, 1787, to revise the Articles of Confederation. At the convention Edmund Randolph presented a set of resolutions outlining a plan of union of the states. Randolph's Thirteenth resolution stated that:

> "provision ought to be made for the amendment of the Articles of the Union whensoever it shall seem necessary, and the assent of the National Legislature ought not to be required thereto."

Objection arose as to the assent of the national legislature not being required for the adoption of an amendment, which resulted in the latter part of the resolution being stricken out. The resolution as thus changed was adopted and referred to the committee of detail. Article XIX of the first draft of the Constitution was as follows:

> "On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose."

Article XIX was first adopted in the above form. Upon reconsideration, however, it was decided that the national legislature should be given some power to initiate amendments, because that body would be the first to realize the need for a change. James Madison then proposed the following as a substitute to Article XIX:

> "The Legislature of the U—— S—— whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as parts thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Legislature of the U. S."

John Rutledge of South Carolina proposed that the following clause be added:

> "provided that no amendments which may be made prior to the year 1808. shall in any manner affect the 4 & 5 sections of the VII article."

Rutledge's proposal was accepted.

Article XIX of the first draft of the Constitution was designated Article V of the second draft, and read as follows:

> "The Congress, whenever two-thirds of both houses shall deem necessary, or on the application of two-thirds of the legislatures of the several states, shall propose amendments to this constitution, which shall be valid to all intents and purposes, as parts thereof, when the same shall have been ratified by three-fourths at least of the legislatures of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: Provided, that no amendment which may be made prior to the year 1808 shall in any manner affect the and sections of article. "

Thereafter the Article was amended by adding the clause:

> "that no State, without its consent shall be deprived of its equal suffrage in the Senate."

The adoption of this amendment gave final form to Article V.

An analysis of this Article of the Constitution discloses that the only power granted to a state with respect to acting on a proposed amendment is the power to ratify such amendment. This Court has held that the power of a state to ratify a proposed amendment is derived from the Federal Constitution. Hawke v. Smith, 253 U. S. 221; Leser v. Garnett, 258 U. S. 130.

It is true that a state has the power to fail or refuse to ratify a proposed amendment to the Federal Constitution. Such a power, however, is an inherent rather than a granted power. It is a part of the legislature's natural power and right to refuse to do anything which is not

mandatory. As the power of the legislature to reject a proposed amendment is an innate power, the exercise thereof does not operate to extinguish the power. It is of a continuing nature, terminable only by an exercise of the power to ratify, and until the power to ratify is exercised, the power to reject may be exercised as often and as many times as the legislature may desire.

Superimposed on the legislature's power to reject a proposed amendment is the granted power to ratify such an amendment. An exercise of the power to ratify cuts off and ends the power to reject. When a legislature once ratifies a proposed amendment such action is final. A subsequent attempt to reject the proposal would be ineffectual. The granted power to ratify is expended by its first exercise. The power cannot be recalled, and the act of ratification is irrevocable.

These views conform generally to the best available authorities on the question. Thus Jameson, in the Fourth Edition of his Constitutional Conventions, at page 628, wrote:

> "But, whether this decision is authority upon the question now considered or not, the right of a State legislature, after a negative vote has once been passed, to recede from it and ratify an amendment, is, we think, upon principle, unquestionable. The language of the Constitution is, that amendments proposed by Congress, in the mode prescribed, 'shall be valid to all intents and purposes, as part of this Constitution, *when ratified by the legislatures of three-fourths of the several States*, &c. By this language is conferred upon the States, by the National Constitution, a special power; it is not a power belonging to them originally by virtue of rights reserved or otherwise. When exercised, as contemplated by the Constitution, by ratifying, it ceases to be a power, and any attempt to exercise it again must be a nullity. But, until so exercised, the power undoubtedly, for a reasonable time at least, remains."

Professor W. F. Dodd, writing in 30 Yale Law Journal 321, 346-347, stated:

> "As Jameson says, Congress has definitely taken the view in this instance that a state having once ratified may not withdraw its ratification of a federal amendment. This view seems clearly a correct one. . . .
>
> "On the other hand, it is perhaps clear that a state legislature has a continuing power of ratification until an amendment is adopted, or until such a long period has elapsed that a sort of statute of limitations may be said to have run against any power to ratify the proposal. It may be remembered that the power in the state legislature is one derived from the federal Constitution, and is a power to ratify, not a power to reject. If a constitutional convention is proposed, one state legislative session may not by explicitly rejecting prevent the future exercise of the federal power conferred upon the state legislature. Rejection by a state legislature is in this respect equivalent to the negative result arising from state legislative inaction. There is no power in and of itself to reject a federal constitutional amendment, and failure to ratify by one-fourth of the states is sufficient."

In his treatise on Constitutional Law, at page 204, Judge Cooley wrote:

> "It is interesting, however, to note that, in a somewhat analogous case, it has been repeatedly decided that consent once given is given finally. Where by statute a municipality is permitted, with the consent of a majority of its electors, to raise exceptional taxes or assume exceptional burdens an election once held which results in a favorable vote is conclusive. If, however, the first election results in a majority against the proposal, and there is nothing in the law which negatives the right to vote again, the case stands as if no election had been had, and the

sense of the people may be taken again and again, and a favorable vote at the last election is as effectual as if it had been obtained at first."

To the same effect are the cases of Woods v. Lawrence County, 1 Black (66 U. S.) 386, and Calhoun County v. Galbraith, 98 U. S. 214.

The views expressed herein are also supported by action of the Congress. On July 20, 1868, Secretary of State Seward announced that if the newly constituted bodies representing themselves as being the legislatures of the states of Alabama, Arkansas, Florida, Louisiana, North Carolina and South Carolina, were the proper bodies to ratify a proposed amendment to the Federal Constitution, and if the attempts of the legislatures of Ohio and New Jersey to change their prior ratifications to rejections were not considered, then the Fourteenth Amendment had been adopted. On the next day the Congress passed and transmitted to the Secretary of State a concurrent resolution that the Fourteenth Amendment "is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State." Prior to their votes of ratification, the legislatures of Georgia, North Carolina and South Carolina had voted to reject the proposed amendment. Therefore, the resolution of the Congress is a commitment by that body that a state legislature's ratification of a proposed amendment to the Federal Constitution is final, but that a vote of rejection may thereafter be changed to a vote of ratification.

The Court of Appeals of Kentucky was of the view that the proposal by the Congress of an amendment to the Federal Constitution was analogous to the making of an offer for acceptance or rejection under the law of

contracts. The petitioners do not admit the correctness of such a view. If there is any similarity, it is very slight. The matter of an offer for an acceptance or rejection under the law of contracts contemplates two parties of opposing interests. Such a situation does not exist with respect to the proposal of an amendment to our Federal Constitution. The Federal Constitution is a basic agreement among the people of America entered into for the purpose of forming a partnership or union for their common government. The American people constitute but one party to the Constitution.

In adopting the Federal Constitution the people of America designated and authorized the Congress to act as their agent in proposing amendments to the Constitution. The people further authorized the Congress, in proposing amendments, to designate for the people their agents to ratify the amendments. Therefore, in proposing an amendment to the Constitution, the Congress does not act as an independent party, but merely as the agent of the people of the nation. Likewise, the amendment is not proposed to an independent party or parties but merely to other agents of the people. The people have agreed that in the process of ratifying a proposed amendment they are to be divided into groups, with the people in each of the several states comprising one group. The ratifying conventions or legislatures, as the case may be, act as agents of the people in their respective states. The whole amending process is by and for the people of America. Thus we see that the proposal of an amendment to our Federal Constitution differs fundamentally from an offer for acceptance or rejection under the law of contracts.

(2) Rejection of the Proposed Amendment by More Than One-Fourth of the States Did Not Defeat the Proposal

The Court of Appeals of Kentucky concluded that the proposed Child Labor Amendment was not subject to ratification by the Kentucky Legislature because it was no longer pending, by reason of having been rejected by more than one-fourth of the states.

If our previous arguments about a rejection of a proposed amendment not preventing subsequent action thereon are sound, then it follows that the rejection of the proposed Child Labor Amendment by more than one-fourth of the states did not and could not operate to defeat the proposal. The rejections by the states were equivalent to inaction by them. The states were not bound by their rejections.

Rejection of a proposed amendment by more than one-fourth of the states does not *ipso facto* defeat the proposal, but merely indicates that the proposal will not be adopted. If thirty-six or more states were to reject a proposed amendment, such action would doubtless be accepted by the people of the nation as conclusive that the proposal would not be adopted. Subsequent ratification by other states would seem futile and perhaps would not occur. The proposal would later terminate by the elapse of time as hereinafter explained.

(3) The Proposed Amendment Had Not Terminated by the Elapse of a Reasonable Time

The Court of Appeals of Kentucky was further of the opinion that at the time the Kentucky Legislature purported to ratify the proposed Child Labor Amendment the proposal had terminated by reason of the expiration of a reasonable time for ratification since its submission, and was therefore no longer before the

people. In arriving at this conclusion the Kentucky Court was influenced by the opinion of this Court in the case of Dillon v. Gloss, 256 U. S. 368, in which this Court held that the period of seven years prescribed by Congress for the ratification of the Eighteenth Amendment was a reasonable period of time.

In proposing the Child Labor Amendment, the Congress did not specify any time for the completion of the ratification. We believe that there should be some limitation as to the period of time during which a proposed amendment should be considered as pending before the people for ratification. In determining such a period of time consideration should be given to several facts. The framers of the Constitution thought it wise that the amendment of the Constitution should be a slow and difficult process. They therefore provided a procedure for amendment which would require a considerable period of time to complete. If the framers of the Constitution intended that a long period of time should be required for the amendment of the Constitution, the subsequent increase in the number of states and increase in population of the nation would make a much longer period of time reasonable today. Frequent action by the legislatures of the several states with respect to a proposed amendment should be considered as keeping the proposal alive. If only a reasonable time expires between action on the proposal by one legislature and action on the proposal by another legislature, and that process continues until a large number of legislatures—less than thirty-six—have acted, then it seems reasonable that the proposal has not terminated by the elapse of time even though a period of several years has expired between the action of the first state and the action of the last state. If a period of several years expires between the action by one legislature on the proposal and the action by the next legislature on the pro-

posal, then it may be considered that the proposal has terminated by the elapse of time. Also, if a period of several years has expired since the action by the last state, and the number of states having ratified is less than thirty-six, then it may be considered that the proposal has terminated by the elapse of time. Applying these principles to the proposed Child Labor Amendment we find that three years is the longest period of time that expired during which there was no action on the proposal by any legislature. It is submitted that three years is too short a time to constitute such a period of time as would terminate the pendency of the proposed amendment.

CONCLUSION

The questions involved in this case are very serious and very important in their nature. They relate to the fundamental rights of self-government by the people of the nation. They have produced doubt and fear among the people. They should be clarified and answered by the highest court of the land.

Respectfully submitted,

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and
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Assistant Attorneys General of the Commonwealth of Kentucky, Frankfort, Kentucky.

Attorneys for Petitioners

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. [redacted] 14

ALBERT BENJAMIN CHANDLER, Individually and as Governor of the Commonwealth of Kentucky, Et Al., - - - - - - - - - - Petitioners,

versus

JAMES E. WISE, and RAY B. MOSS, - - - - - - - - - Respondents.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

LAFON ALLEN,
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Attorneys for Respondents.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No._____

ALBERT BENJAMIN CHANDLER, INDIVIDUALLY AND AS GOVERNOR OF THE COMMONWEALTH OF KENTUCKY, ET AL., - - - *Petitioners,*

v.

JAMES E. WISE, AND RAY B. MOSS, - - - - - *Respondents.*

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

The decision of the Court of Appeals of the Commonwealth of Kentucky, which the petitioners seek to have reviewed by this Court, was based upon a certain interpretation of Article V of the Constitution of the United States, providing the manner in which that instrument may be amended.

There is now pending in this Court a petition for a writ of certiorari in the case (No. 796) of Rollo W. Coleman, *et al.*, petitioners, versus Clarence W.

Miller, as Secretary of the Senate of the State of Kansas, *et al.*, respondents, to review a judgment of the Supreme Court of the State of Kansas, which was based upon an interpretation of Article V of the Constitution of the United States in a sense exactly opposed to the interpretation put upon that Article by the Court of Appeals of Kentucky.

In view of the conflict between these decisions by the highest courts of two States of the Union, of federal questions of substance not heretofore determined by this Court, and of the public importance of a final and conclusive determination by this Court of the constitutional questions involved, we are not disposed to resist petitioners' application for a writ of certiorari in this case.

Respectfully submitted,

LAFON ALLEN,
OLDHAM CLARKE,
Attorneys for Respondents.

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BRIEF FOR RESPONDENTS.

LAFON ALLEN,
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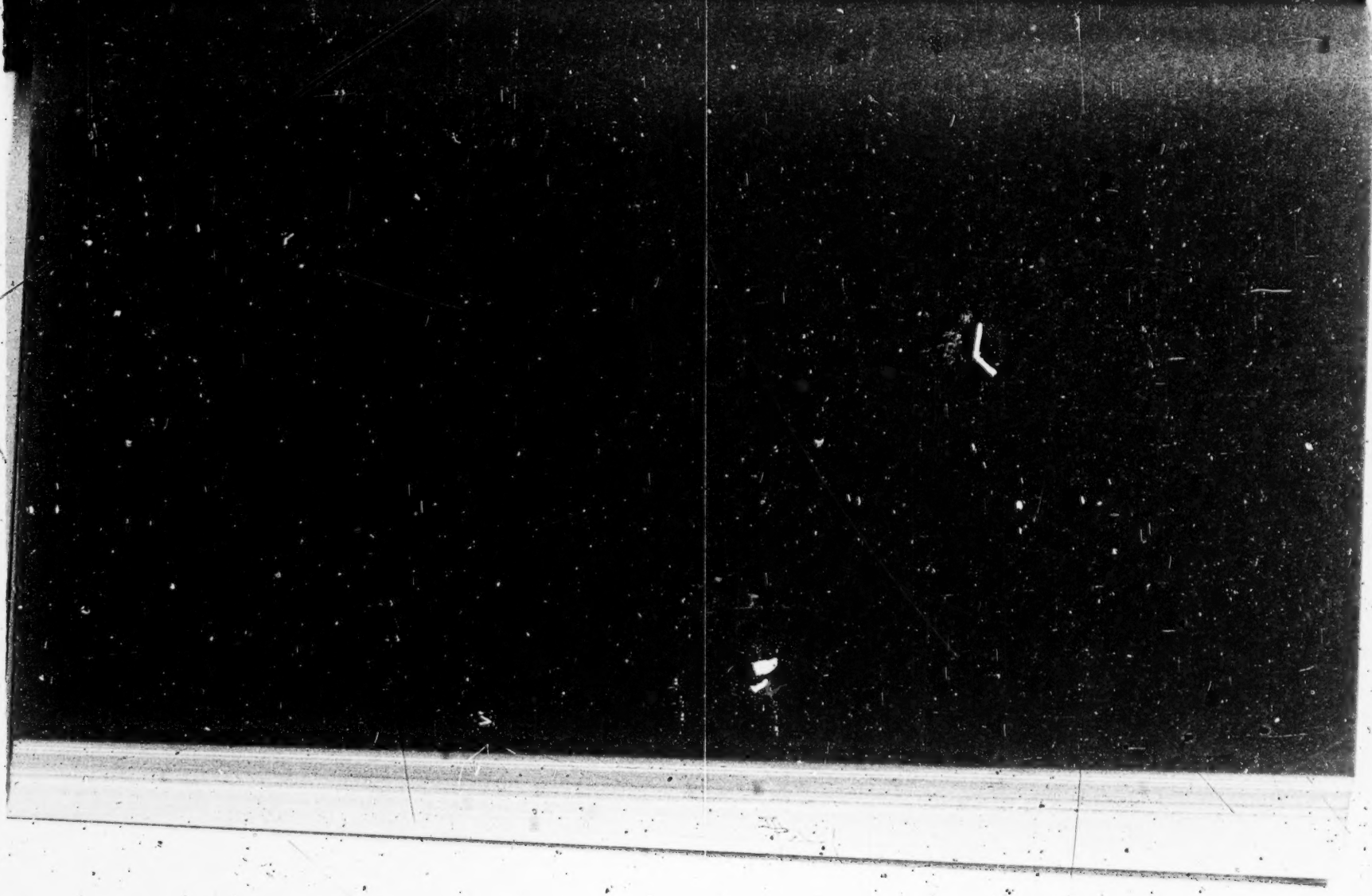
Solicitors for Respondents.

October 1, 1938.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

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ALBERT BENJAMIN CHANDLER, INDIVIDUALLY AND AS GOVERNOR OF THE COMMONWEALTH OF KENTUCKY, ET AL., - *Petitioners,*

v.

JAMES E. WISE AND RAY B. MOSS, - *Respondents.*

BRIEF FOR RESPONDENTS.

REFERENCE TO OFFICIAL REPORTS OF OPINIONS DELIVERED BY COURT BELOW.

Wise, et al., v. Chandler, et al., 270 Ky. 1, 108 S. W. (2d) 1024.

Chandler, et al., v. *Wise, et al.*, 271 Ky. 252, 111 S. W. (2d) 633.

The opinions of the court below are printed in full in the Transcript of Record (R. 33 and 34-55).

JURISDICTION.

(1) The judgment to be reviewed was entered by the Court of Appeals of Kentucky on December 17, 1937 (R. 33).

The Court of Appeals is the highest court of the Commonwealth of Kentucky in which a decision in this suit could be had (Constitution of Kentucky, §§109 and 110).

(2) The specific claim advanced, and the ruling made, in the lower court which is relied upon as the basis of this Court's jurisdiction, was that the resolution of the Legislature of Kentucky adopted January 13, 1937, purporting to ratify the proposed Amendment to the Constitution of the United States giving to the Congress the power to limit, regulate and prohibit the labor of persons under eighteen years of age, which Amendment was proposed by the Congress on June 2, 1924, was not adopted in accordance with the requirements of Article V of the Constitution of the United States and was, therefore, inoperative as an act of ratification (R. 6, 30, and 33).

(3) The jurisdiction of this Court is invoked under the United States Code, Title 28, §237, amended: 28 U. S. C. A., §344(b); 8 F. C. A., Title 28, §344(b).

(4) The following cases are believed to sustain the jurisdiction of this Court in the instant case:

Dillon v. *Gloss*, 256 U. S. 368, 41 S. Ct. 510, 65 L. Ed. 994;

Hawke v. *Smith*, 253 U. S. 221, 40 S. Ct. 495, 64 L. Ed. 1504;

Leser v. *Garnett*, 258 U. S. 130, 42 S. Ct. 217, 66 L. Ed. 505;

Nashville, C. and T. R. Co. v. *Wallace*, 288 U. S. 249, 53 S. Ct. 345, 77 L. Ed. 730.

STATEMENT OF THE CASE.

The facts of the case are not in dispute. The judgment affirmed by the court below was entered upon the petition of plaintiffs (respondents here), after the general demurrer of defendants (petitioners here) had been overruled and they had declined to plead further (R. 29 and 33).

On June 2, 1924, the Congress of the United States duly proposed to the States an amendment of the Federal Constitution, commonly referred to (and herein referred to) as the Child Labor Amendment, which when ratified by the legislatures of three-fourths of the several States should be valid to all intents and purposes as part of the Constitution (R. 2 and 24).

On March 24, 1926, the Kentucky Legislature considered this proposal and duly resolved, both Houses concurring, that the proposed amendment be rejected, for reasons stated in the preamble of the resolution (Appendix D), and that certified copies of the resolution be forwarded by the Governor of Kentucky to the Secretary of State of the United States; to the Presiding Officer of the United States Senate and to the Speaker of the House of Representatives of the United States (R. 3).

The Governor of Kentucky duly forwarded the certificates mentioned in the resolution (R. 3).

On March 24, 1926, including the resolution of the Kentucky Legislature of that date, the Congressional proposal had been considered by the Legislatures of 41 States, had been ratified by 4 of them, had been affirmatively rejected by both Houses of the Legislatures of 24 States, had been affirmatively rejected by resolution of one House of the Legislatures of 6 additional States and had been defeated by adverse action on resolutions of ratification in the legislatures of 7 additional States (R. 9, 13-17).*

At the end of the calendar year 1932, the action of the States, through their respective legislatures, on the proposal stood 6 ratifications and 36 refusals to ratify (R. 10) or, if the 6 States which had taken no action at all be counted as against the proposal, the result was 6 for and 42 against it.†

On December 23, 1936, the Governor of Kentucky issued a proclamation, stating that an emergency existed and convening the General Assembly of Kentucky in extraordinary session for the purpose of considering certain enumerated subjects, not including the Child Labor Amendment (R. 3).

On Friday, January 8, 1937, he issued a so-called amendment to the proclamation of December 23, 1936,

*A complete and more graphic presentment of the history of this proposal before the States will be found in the table designated "Appendix A" and inserted at the end of this brief.

†In point of fact, these six States did act upon the proposal after 1932, two of them ratifying it (in 1933) and four rejecting it (ten times) during 1934-1937.

so as to add to that proclamation the single subject of action on the Child Labor Amendment (R. 3-4)‡

On Tuesday, January 12, 1937, after a two-day, week-end recess of the legislature, the Senate adopted a resolution purporting to ratify the Amendment and on the following day the House of Representatives concurred therein (R. 4).

This attempted ratification of the Amendment was completed within three legislative days after the Governor's amended proclamation had given notice to the public for the first time that action upon the proposed Amendment was contemplated, after almost eleven years of uninterrupted adherence to the decision to reject the Amendment, taken on March 24, 1926.

On Friday, January 15, 1937, shortly after eight o'clock a. m., respondents (plaintiffs and appellees below) filed their petition in the office of the Clerk of the Franklin Circuit Court, praying a judicial declaration, as authorized by the law of Kentucky (Carroll's Code of Civil Practice, Title XIV, Ch. IVa, §§639a-1 to 639a-12), that the above mentioned resolution of the Kentucky Legislature, purporting to ratify the Amendment was invalid and inoperative as a ratification, for the following reasons: (a) because its affirmative rejection of the Amendment on March 24, 1926, had exhausted its power to act upon that proposal (R. 3), (b)

‡The right of the Governor to amend his call of the special session, during that session, was sustained in a case (*Stickler* v. *Higgins*, 269 Ky. 260, 106 S. W., 2d, 1008), which was decided pending the first appeal of this case, in consequence of which the claim made in the original petition herein (R. 5 and 6) that the resolution of ratification, adopted under the amended call, was invalid because in violation of the Constitution of Kentucky, was abandoned.

because the proposal was conclusively defeated in 1925, when it had been affirmatively rejected by more than one-fourth of the States (R. 3), and (c) because its attempted ratification on January 13, 1937, was not taken within a reasonable time after its proposal by the Congress on June 2, 1924 (R. 5). Respondents further prayed that the petitioners (defendants and appellants below) be enjoined from notifying in any manner the Secretary of State of the United States of the action of the Kentucky Legislature in attempting to ratify the Amendment (R. 6).

Immediately upon the filing of the petition, a temporary restraining order was duly entered against each of the Petitioners (R. 8) and attested copies of said order, together with summons addressed to each of the Petitioners (R. 7) were placed in the hands of the Sheriff of Franklin County and by him given to two of his deputies, with instructions for immediate service (R. 11).

At 9:05 o'clock a. m. on that day, said deputy sheriffs proceeded by automobile to the State Capitol, five or six city blocks distant from the Sheriff's office, for the purpose of serving the papers which had been delivered to them, having been instructed by the Sheriff to make the first service, if possible, upon the Petitioner, Albert Benjamin Chandler, Governor of the Commonwealth of Kentucky. The deputy sheriff charged with the duty of serving the Governor went at once to his office but was denied admittance to him and, despite a continuous endeavor to get access to the

Governor, was unable to do so until after the Governor had meanwhile deposited in the post office at Frankfort, Kentucky, a registered letter, addressed to the Secretary of State of the United States at Washington, with inclosed certified copy of the resolution aforesaid purporting to ratify the Amendment (R. 11).

At the time when the deputy sheriff first endeavored to obtain service upon the Governor, the certified copy of the resolution had not then been forwarded to the Secretary of State in Washington (R. 11).

At the time when the Petitioner, Albert Benjamin Chandler, Governor, was served with the summons and restraining order in this case, no notice of the purported ratification of the Amendment had been given to the Secretary of State of the United States (R. 12).

On January 16, 1937.* Respondents filed in the Franklin Circuit Court an amended petition in which they set forth the issuance of the summons and restraining order, above mentioned, the attempt of the deputy sheriff to serve the Governor, the refusal to allow him admission to the Governor for that purpose and the subsequent deposit in the post office at Frankfort of an envelope addressed to the Secretary of State of the United States at Washington and containing the certified copy of the resolution of ratification (R. 9-12).

Upon these averments, Respondents prayed that a mandatory injunction be issued, requiring the Gov-

*In the printed transcript of record the date of the filing of this amended petition is given as February 20, 1937, an error which doubtless resulted from the confusion of this amendment with the second amendment which was filed on February 20, 1937. The true date of the filing of the first amended petition, to-wit, January 16, 1937, is shown by the jurat, which was omitted in printing.

ernor and the other defendants named in their original petition (Petitioners here) to notify forthwith the Secretary of State of the United States by registered mail that, before the sending of the attested copy of the purported resolution of ratification to him, the validity of that resolution as an act of ratification of the Amendment had been challenged in this proceeding, that before the receipt of said copy by the Secretary of State the Governor had been restrained by order of court from giving such notice in any manner and that any notice given in violation of said restraining order was null and void (R. 12).

On February 20, 1937, Respondents filed their second amended petition (R. 12), in which, among other things, they alleged that on January 15, 1937, the Governor was served with summons and restraining order and that the Secretary of State of the United States did not receive the Governor's letter, with a certified copy of the resolution of ratification, above mentioned, until 10:41 a. m. on January 18, 1937, or three days after the summons and restraining order had been served on the Governor (R. 17).

On March 2, 1937, a judgment was entered in the Franklin Circuit Court, sustaining Petitioners' demurrer to the petition as amended on the ground that the facts alleged were not sufficient to constitute a cause of action and, the Respondents declining to plead further, their petition was dismissed and an appeal granted to the Court of Appeals, with the provision that, upon the execution of a bond conditioned accord-

ing to law, an injunction pending said appeal should be allowed, to prevent the defendants or any of them (Petitioners here) from taking any action which would in any manner change the status existing immediately before the entry of the judgment (R. 27-28).

On November 6, 1937, the Court of Appeals of Kentucky issued its mandate, in accordance with its unanimous opinion handed down October 1, 1937, reversing the judgment of the Franklin Circuit Court and remanding the case to that Court with directions to overrule the demurrer to the petition and for such further proceedings as were not inconsistent with the views expressed in its opinion (R. 28).

On December 6, 1937, the Franklin Circuit Court ordered filed the opinion and mandate of the Court of Appeals and in accordance therewith overruled Petitioners' demurrer to Respondents' petition as amended and, Petitioners declining to plead further, entered a judgment to the following effect (R. 29-30):

(1) That an actual controversy existed between the parties to this case, that the plaintiffs had the right to maintain the suit and that the Court had jurisdiction of the cause;

(2) That the resolution of the Kentucky legislature of January 13, 1937, purporting to ratify the Child Labor Amendment, was invalid and void and that the Amendment was not thereby ratified according to the provisions of the Constitution of the United States;

(3) That the notice given by the Governor to the Secretary of State of the United States was of no effect;

(4) That the Clerk of the Franklin Circuit Court give official notice to the Department of State of the United States that the resolution was invalid, that the Amendment had not been ratified according to the Federal Constitution and that the notice given by the Governor to the Secretary of State of the United States was of no effect; that the Clerk of the Franklin Circuit Court send a duly authenticated copy of the judgment to the Secretary of State of the United States, by registered mail, with return receipt requested, to be filed herein;

(5) That the defendants (Petitioners here) be granted an appeal to the Court of Appeals of Kentucky.

On December 11, 1937, the Clerk of the Franklin Circuit Court complied with the direction given him by the judgment of that Court, as stated above, by addressing a letter to the Secretary of State of the United States in Washington, advising him of the terms of the judgment and inclosing an authenticated copy of the judgment. The receipt of this letter and the accompanying copy of the judgment was acknowledged by the Department of State by letter dated December 17, 1937.

On December 17, 1937, the Court of Appeals of Kentucky, the whole court sitting, filed a *per curiam* opinion, in which it declared that no new issue or additional question was presented on the second appeal and that it had not changed its view on any of the questions formerly presented, including those raised under the

Federal Constitution. It thereupon entered a judgment affirming the judgment of the Franklin Circuit Court (R. 33).

On March 30, 1938, the Petitioners (defendants and appellees below) filed in this Court their petition for a writ of certiorari, to which Respondents filed a brief in response, stating that, in view of the novelty and importance of the questions presented and of the conflicting decision of the Supreme Court of Kansas, now under review by this Court (*Coleman, et al.*, v. *Miller, et al.*, October Term, 1938, No. 7), they were not disposed to resist the application for the writ.

On April 11, 1938, this Court granted a writ of certiorari to review the judgment of the Court of Appeals in this case.

SUMMARY OF ARGUMENT.

I.

When a State takes affirmative action on a proposal for amendment of the Federal Constitution, whether by ratifying or rejecting it, its power is exhausted and its action upon that proposal cannot be retracted.

II.

When more than one-fourth of the States have affirmatively rejected such a proposal, the fate of that proposal is determined as conclusively as it would have been if three-fourths of the States had ratified it, even if a State had the power, prior to such determination, to reverse the action theretofore taken by it.

III.

In view of the history of the proposal of the Child Labor Amendment before the States, a reasonable time for its adoption had expired and it was no longer pending or open to action by any State at the time when the Kentucky legislature attempted to ratify the proposal, even though its original power to act had not theretofore been exhausted by the first exercise thereof nor had been terminated by the antecedent defeat of the proposal by the adverse votes of more than one-fourth of the States.

ARGUMENT.

Introduction:

The questions here presented for decision are strictly constitutional questions. They have no relation to the Child Labor Amendment which they would not have, in like circumstances, to any other amendment that might be proposed. They call for no discussion of the child labor "problem" itself nor of the solution of that problem. Whether the labor of persons under eighteen years of age should be limited or regulated or prohibited at all, or to what extent or in what manner, whether the power to do so should be left to the States, as heretofore, or should be granted to the Federal Government, as proposed, are matters foreign to this argument.

The questions here relate solely to the nature, the scope and the limitations of the powers granted or reserved by Article V of the Federal Constitution.

There is in this case no question merely of procedure. The haste with which the resolution of ratification was driven through the Kentucky legislature, in utter disregard of the known and inveterate hostility to the proposal of the public opinion of the State and certainly without the slightest opportunity for ascertaining a change in that opinion, if any there was, deprives the resolution of every vestige of respectability as an expression of the popular will. But no objection is made here on that ground. Although the proceedings in the legislature defied every principle of deliberative, representative government, we do not question the sufficiency of those proceedings to accomplish the ratification of the proposal, *if the legislature had power to act at all to that end.*

In the final analysis, therefore, we have only questions of power.

Was the power of the Kentucky legislature, which had been invoked by the Congressional proposal, exhausted by the decision, taken eleven years earlier, to reject the proposal?

Was that power terminated, twelve years earlier, by the contemporaneous rejection of the proposal by more than one-fourth of the States?

Had that power expired, before ratification was attempted, because the proposal, made almost thirteen years earlier, was then no longer pending before the States or, to use Judge Jameson's expression, quoted with approval in the opinion of this Court in *Dillon* v. *Gloss*,* because the proposal, in such circumstances,

*256 U. S. 368, 41 S. Ct. 510, 65 L. Ed. 994.

"ought to be regarded as waived, and not again to be voted upon unless a second time proposed by Congress"?

The court below answered each of these questions in the affirmative, upon grounds ably and, we think, convincingly stated in its unanimous opinion. There were no judicial precedents upon these exact questions, although there were implications in the *Dillon Case*, which seemed to point the way. As we shall attempt to show, even political precedents were lacking. The questions were therefore, of first impression and it was necessary to rely upon the phrasing of Article V, as construed by this Court, upon such inferences as might reasonably be drawn therefrom, with such aid as might be found in the purpose and history of that Article, in academic discussions by commentators on the Constitution and in occasional statements by public men.†

While each of the grounds upon which the court below based its decision, considered separately, is, we submit, sufficient to sustain the judgment, we think those grounds are not unrelated but that all of them, for like reasons, are implied in the ratification provisions of Article V.

It was no doubt contemplated by the members of the Federal Convention that decisive action by the States upon a Congressional proposal for amendment

†The great and increasing interest in the process of amending the Constitution during the past two or three decades is attested by the voluminous literature on the subject, to be found chiefly in legal periodicals. We have prepared a list of such writings of this kind as have come to our notice and have printed it as an appendix to this brief (Appendix E). They disclose a great diversity of views on sundry points. As to the grounds of the decision below, they have, we think, a clear tendency to support them.

would be the shortest stage in the whole process of amendment, and certainly this has been true historically. First, there would arise some controversy or agitation with respect to social, political or economic conditions, which would sooner or later result in the suggestion that an amendment of the Constitution was called for. This is the stage of propaganda and prolonged public discussion.

The second stage has its scene in the Houses of Congress, where a campaign is waged for the proposal of the desired amendment. Active propagandists and skilled agitators appear upon the scene. Usually, the campaign must be renewed in many successive Congresses, before the desired end has been attained. Public hearings before the committees of both Houses are had. Deliberations of the committees themselves, debates in both Houses upon the reports of the committees, all take time. And this debate has not always been confined to the Houses of Congress. Not infrequently the press, the platform and sometimes the pulpit have continued their contributions to the discussion. It is said that in the century and a half since the adoption of the first ten Amendments (Bill of Rights), 3,105 amendments have been offered in Congress, that of these only 16 have found enough support to secure their submission to the States and that of those 16 only 11 have been adopted.*

The third and final stage in the process of amendment is the action of the States upon the Congressional

*Garrett, "Amending the Federal Constitution," 7 Tenn. Law Review, 300.

proposal. As was to be expected, this has proved to be the shortest stage of all. The average time taken for the adoption of the last eleven Amendments of the Constitution has been one year, six months and thirteen days.* The last five Amendments, Seventeenth to Twenty-first, inclusive (1913-1933), were adopted in the average time of twelve months and ten days.

We exclude from our computation the five proposals which have failed of adoption. The latest of these is the proposal of the Child Labor Amendment, which is now well on in its fifteenth year. The next older proposal that has failed of adoption is the so-called Corwin Amendment which it was hoped might prevent the Civil War. Surely, it will not be contended that this proposal and the earlier three which failed of adoption are still pending.

We respectfully submit that it may be assumed that the men who framed and ratified the Federal Constitution anticipated that every suggestion for its amendment, before submission to the States for their action, would pass through the stages above described, that the mere fact of the submission of a proposal for amendment by Congress in itself would indicate that it had received long prior discussion and that consequently prompt action by the States on the proposal was anticipated and intended. Certainly, promptness

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*Eleventh: 3 yrs., 3 mos., 24 days
Twelfth: 9 mos., 13 days
Thirteenth: 10 mos., 18 days
Fourteenth: 2 yrs., 1 mo., 15 days
Fifteenth: 1 yr., 1 mo., 3 days
Sixteenth: 3 yrs., 6 mos., 25 days
Seventeenth: 1 yr., 16 days
Eighteenth: 1 yr., 1 mo., 10 days
Nineteenth: 1 yr., 2 mos., 21 days
Twentieth: 11 mos., 3 days
Twenty-first: 9 mos., 15 days

Average time: 1 yr., 6 mos., 13 days.

of action characterized the ratification of the Constitution itself. Only eight months and twenty-four days elapsed between September 28, 1787, when the Congress of the Confederation ordered the report of the Federal Convention to be transmitted to the legislatures of the States, and June 21, 1788, when the ninth ratification took place which brought the Constitution into effect. In that short interval of time, the draft of a new Constitution was transmitted to the legislature of each State, the legislature of each State adopted an act or resolution calling a delegate convention, the delegates to each of those conventions were elected and assembled and, in many States, entered upon a prolonged and somewhat violent debate as to "conditional" ratifications, as to "previous" or "subsequent" amendments and as to other disputed matters, so familiar to the student of those times.

This Court, in the *Dillon Case,* interpreted Article V as requiring that amendments, when proposed, be considered and disposed of presently. We submit that it is consonant with this interpretation to conclude that the first affirmative action taken by a State is final and that upon the "roll call of the States", both "yeas" and 'nays", are to be counted and the result determined in accordance therewith.

We now turn from these observations of a general nature to a more careful consideration of the grounds of the decision below.

I.

STATE ACTION UPON A PROPOSED AMENDMENT EXHAUSTS THE POWER INVOKED BY THE PROPOSAL OF THE AMENDMENT.

That State action upon a proposed amendment is intrinsically the same, whether taken by legislatures or by conventions will hardly be disputed:

> "If an amendment to the Federal Constitution should be proposed by Congress, and submitted to State Conventions instead of to the legislatures, the powers and disabilities of the two classes of bodies in respect to the amendment would, it is conceived, be precisely the same."*
>
> "Conventions, like legislatures, are mere agents of the people. . . . The ratifying process is equivalent to a roll-call of the States."†

In *Dillon* v. *Gloss, supra*, this Court, referring to the two methods of ratification authorized by Article V, said:

> "The plain meaning of this is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that the ratification by these assemblies in three-fourths of the states shall be taken as a decisive expression of the people's will and be binding on all."

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*Jameson, "A Treatise on Constitutional Conventions," 4th ed., §586.

†Prof. Lester B. Orfield, "Federal Amending Power," 25 Ill. Law Review, 418.

In *Hawke* v. *Smith*,‡ this Court, speaking on the same subject, said:

> "Both methods of ratification, by legislatures or conventions, call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people."

In the growing literature on this subject, no writer has been bold enough to take or defend the position that the delegates to a State convention, who had been elected and assembled for the single purpose of acting upon a proposed amendment to the Federal Constitution and who, after adopting a resolution rejecting the proposal, had adjourned *sine die*, could thereafter (eleven years thereafter, let us say) reassemble, reopen the subject and adopt a resolution of ratification.

The functional identity of State legislatures and State conventions, when called upon to speak for the people of the States under Article V of the Federal Constitution, is further shown by the well established doctrine that a State legislature, when so acting, is not exercising ordinary law-making powers but is performing a Federal function, in consequence of which a resolution of ratification is not subject to the veto of the Governor of that State nor to the initiative and referendum provisions of the State constitution:

Leser v. *Garnett, supra;*
Hawke v. *Smith, supra;*
Rhode Island v. *Palmer* (National Prohibition Cases), 253 U. S. 350, 64 L. Ed. 946.

‡253 U. S. 221, 40 S. Ct. 495, 64 L. Ed. 871.

Mr. Justice Day, writing the opinion of the Court in *Hawke* v. *Smith,* said:

> "Ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment."

Mr. Justice Van Devanter, writing the opinion of the Court in *Rhode Island* v. *Palmer,* said:

> "The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification *or rejection* of amendments to it." (Italics ours.)

A State legislature, therefore, when acting pursuant to Article V, is acting as a representative body to express the will of the people of the State. It is, as was said in *Dillon* v. *Gloss, supra,* a "representative assembly", whose action constitutes "a decisive expression of the people's will". It is a sort of ready-made convention and its function and power is exactly the same as those of a convention specially constituted for the purpose of acting upon a proposed amendment. As was said by Judge Jameson, "the powers and disabilities of the two classes of bodies in respect to the amendment would, it is conceived, be precisely the same."

In view of the inevitable stages in the process of amendment, to which we have alluded, it seems to us

to be a sound and natural construction of Article V that, when a State, whether by legislature or convention, has taken affirmative action upon a proposal for amendment, its decision is final, its power so to act is exhausted and it cannot take any further action upon the proposal, unless there is a new submission of the question by Congress. But the public excitement and partisan passion aroused by the conflict over the "reconstruction" of the governments of the seceding States after the Civil War gave birth to a contrary view,—a view which we think finds no justification in the language of Article V and which contains within itself an inconsistency that was countenanced only because it suited the exigencies of the policy of the Radical Republicans of the North. That view was that a state legislature, in voicing the will of the people on a proposal for the amendment of the Federal Constitution, is bound by its first action, if it is a ratification of the proposal, but is not bound by its first action, if it is a rejection of the proposal.

So far as we know, the first expression of this view came from Thomas E. Bramlette, a Civil War Governor of Kentucky, who was elected to that office while serving as a Major General in the Union Army. In 1865, the Thirteenth Amendment, abolishing slavery, was proposed by Congress and was promptly adopted. The Kentucky legislature, however, rejected that proposal and requested the Governor to forward copies of its resolution to the President of the United States, the President of the Senate and the Speaker of the

House of Representatives. Governor Bramlette responded with a message in which he declared his purpose to comply with the request to forward the resolution to Washington, but took occasion to express his strong disapprobation of the action of the legislature and in that connection said:

> "Rejection by the present Legislative Assembly only remits the question to the people and the succeeding Legislature. Rejection no more precludes future ratification than refusal to adopt any other measure would preclude the action of your successors. 'When ratified by the Legislatures of three-fourths of the several States', the question will be finally withdrawn, and not before. Until 'ratified', it will remain an open question for the ratification of 'the Legislatures of the several States.' 'When ratified' by the Legislature of a State, it will be final as to such State; and 'when ratified by the Legislatures of three-fourths of the several States', will be final as to all. Nothing but ratification forecloses the right of action. 'When ratified', all power is expended. Until 'ratified', the right to ratify remains."*

The outcome of the War made the adoption of the Thirteenth Amendment a foregone conclusion and no question has ever arisen as to its validity, but since Governor Bramlette's view has been adopted by Judge Jameson and other commentators, we would point out that it was based upon a supposed analogy to the ordinary course of legislation. He said that rejection

*Kentucky Session Acts, 1865, p. 157.
Bodley and Wilson, "History of Kentucky," Vol. II, p. 281.

of an Amendment no more precluded its future ratification "than refusal to adopt any other measure would preclude the action of your successors". In view of the repeated decisions* of this Court that a state legislature, in acting upon a proposed amendment, is not engaged in legislation but is performing the function of a representative assembly, called upon to voice the will of the people upon the proposal, the analogy suggested by Governor Bramlette cannot be accepted.

It is, however, the proceedings in connection with the Fourteenth Amendment that are chiefly relied upon by those commentators who have adopted Governor Bramlette's view. That Amendment was proposed in June, 1866, and, as we have seen, required more than two years for adoption. It was generally apprehended that the first section of the Amendment, declaring that all persons born or naturalized in the United States and subject to the jurisdiction thereof were citizens of the United States and of the State wherein they resided, and forbidding the States to make or enforce laws which should abridge the privileges or immunities of citizens of the United States, or deprive any person of life, liberty or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws, was intended to give, or at least would have the effect of giving, the right of suffrage to the freedmen. For this reason, there was strong opposition to it, not only in the South,

Leser v. *Garnett*, *supra*;
Hawke v. *Smith*, *supra*;
National Prohibition Cases, *supra*.

but in the North. At that time there existed in many of the Southern States civil governments which had been set up with Lincoln's approval, in accordance not only with his amnesty proclamation, but with the theory to which he had adhered throughout the contest that the seceding States had never been out of the Union. The legislatures of eight of those States, Virginia, Louisiana, Tennessee, Arkansas, South Carolina, North Carolina, Alabama and Georgia, had ratified the Thirteenth Amendment and had been named in Secretary Seward's proclamation of the adoption of that Amendment on December 18, 1865.*

But two of them, North Carolina and South Carolina, rejected the Fourteenth Amendment and the others, except Tennessee which ratified, failed to ratify. Meanwhile, the tragic blunders of Reconstruction were in process of incubation and, after the death of President Lincoln, the Radical Republicans in Congress secured the passage of the first and second Reconstruction Acts (March, 1867), both over the vetoes of President Johnson. The first of these Acts recited that "no legal state government or adequate protection for life or property now exists in the rebel states of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas and Arkansas". The territory embraced within those States was divided into "Military Districts", each of which was put under the superintendence and control of a major-general. The whole matter of Reconstruction was taken over by Congress, which had

*"Documentary History of the Constitution," Vol. II, p. 636.

strongly resented Lincoln's assumption that this was the business of the Executive Department of the Government.

Thus were the "carpet bag" governments ushered in and it was by such governments in the States of Arkansas, Florida, North Carolina, South Carolina, Louisiana and Alabama that the Fourteenth Amendment was finally ratified. Meanwhile, the legislatures of Ohio and New Jersey, which had first ratified the Amendment, adopted resolutions withdrawing their consent. It was in this extraordinary situation that Secretary Seward, on July 20, 1868, issued his first proclamation with reference to the Fourteenth Amendment. He first pointed out, not only that New Jersey and Ohio had attempted to withdraw their ratifications, but also that in Arkansas, Florida, North Carolina, Louisiana, South Carolina and Alabama, resolutions of ratification had been adopted "by newly constituted and newly established bodies avowing themselves to be, and acting as the Legislatures respectively of" those States. He said that it was "deemed a matter of doubt and uncertainty" whether the later resolutions of Ohio and New Jersey were "not irregular, invalid and therefore ineffectual for withdrawing the consent of the said two States". His proclamation then continued thus:

> "And whereas the twenty-three States first hereinbefore named, whose legislatures have ratified the said proposed amendment, and the six States next thereafter named, as having ratified the said proposed amendment by newly constituted

and established legislative bodies, together constitute three-fourths of the whole number of States in the United States;

"Now, therefore, be it known that I, William H. Seward, Secretary of State of the United States, by virtue and in pursuance of the second section of the Act of Congress approved the twentieth of April, eighteen hundred and eighteen hereinbefore cited, do hereby certify that, if the resolutions of the legislatures of Ohio and New Jersey ratifying the aforesaid amendment are to be deemed as remaining of full force and effect, notwithstanding the subsequent resolutions of the legislatures of those States which purport to withdraw the consent of said States from such ratification, then the aforesaid amendment has been ratified in the manner hereinbefore mentioned and so has become valid to all intents and purposes as a part of the Constitution of the United States."

Upon the submission of this inconclusive proclamation to Congress, that body, on the following day, July 21, 1868, declared that the Amendment had been adopted and directed the Secretary of State to "promulgate" it as a part of the Constitution. Georgia had, on that very day, withdrawn her former rejection and ratified and Secretary Seward included that State in his second proclamation of July 28, 1868.*

At the time of these happenings, there were thirty-seven States in the Union, so that ratifications by twenty-eight of them were required for adoption of the Amendment. There were twenty-five ratifications

*"Documentary History of the Constitution," Vol. II, pp. 873, 893.

about which there was no question. Three more were needed. Ohio and New Jersey had ratified and subsequently rejected. North Carolina and South Carolina had ratified, through their "carpet bag" legislatures, after having rejected the Amendment through legislatures elected in the manner authorized by Lincoln. If these four States, as well as Georgia which had ratified before Seward's second proclamation, were all counted as ratifying, there were thirty ratifications, or two more than were required for adoption. Congress resolved all doubts in favor of adoption. States that had ratified and then rejected and States that had rejected and then ratified were all counted as ratifying.

What conclusions are to be drawn from this unhappy history? What lesson has it for the student of constitutional law? It was in this tense atmosphere that Judge Jameson wrote his book† and it was from this non-judicial precedent that, in later editions, he drew the extraordinary conclusion that consent to an amendment once given, no matter how hastily and inconsiderately, is irrevocable but that its rejection, no matter how deliberate or how often repeated, may at any time be overridden, even under circumstances (as in the present case) which excluded all opportunity for hearing or deliberation. Upon this theory, a proposal for amending the Federal Constitution can never be *defeated*, since votes of rejection, though affirmative in form and buttressed with statements of the reasons for rejection, are treated as no votes at all, hav-

†Jameson, "The Constitutional Convention," 1st ed., 1867.

ing no more effect than complete inaction on the part of the rejecting State.*

Although Governor Bramlette preceded him, it was Judge Jameson who gave wide currency to this view. In his first edition, he had said that, "although the subject [was] not free from difficulties," it was "probable" that Governor Bramlette's view would be accepted as the true construction of Article V.

The incidents attending the adoption of the Fourteenth Amendment had not then taken place and the only reason he gave for adopting Governor Bramlette's opinion was that the failure to mention rejections in Article V "could hardly have been unintentional" and that consequently "it would seem a stretch of power to interpolate into that Article that, if rejected by one legislature or by three-fourths or even all State legislatures, such action should be taken to be definitive".

We think Judge Jameson did not improve upon Governor Bramlette's argument. He employed against his own thesis the controversial stratagem of the *reductio ad absurdum*. Did he really mean to be taken literally when he said that, even though all of the States rejected a proposal for amendment, there would be no decision of the question and the matter would stand just as if no action had been taken at all?

So far as concerns the precedent set by Congress in connection with the adoption of the Fourteenth

*Jameson, "Constitutional Conventions," 4th ed., §579; Orfield, "Federal Amending Power," 25 Ill. Law Review, 418.

Amendment, we admit the propriety of its action in counting the votes of New Jersey and Ohio, since this accords with our contention that a State which has once acted upon the question of ratifying an amendment has exhausted its power and cannot thereafter reverse its action. As to the counting of the votes of Georgia and the two Carolinas, the avowed justification for this was, not that those States could ratify despite their previous rejections, but that their previous rejections were void because the then governments of those States were illegal and their legislatures were without authority to act upon the amendment at all. It is thus seen that this celebrated episode, so often cited as a precedent for the right of a State to ratify after having once rejected, has no validity even as a political precedent.

After the adoption of the Fourteenth and Fifteenth Amendments, Judge Jameson revised and enlarged this part of his book* and leaned heavily on the transactions connected with the adoption of the Fourteenth Amendment to support the view expressed in his first edition. He admits that "it would be puerile to contend that a right to pass upon a proposition does not involve a right either to reject or to ratify it,"† but he immediately undertakes to whittle away the right of rejection by an argument which seems to us very technical and "legalistic" and which brings him, at last, to the conclusion that rejections are allowed but are to be given no effect.

*Op. cit. *supra*, 4th ed. (1887), §§578-586.

†§581.

We have given prominence to Judge Jameson's exposition of this subject because his conclusion has been accepted by many later commentators, without adding anything to the argument supporting it. His followers, like Judge Jameson himself, seem to leave out of consideration the substance and purpose of Article V and to engage in a sort of legal logomachy. They seem to forget that the purpose of referring a proposed amendment to the State legislatures was to ascertain the will of the people through the action of those bodies. They seem to overlook the fact that "both methods of ratification, by legislatures or conventions, call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people."* They seem to say that the action of one of those deliberative assemblies does not voice the will of the people, if the proposal is rejected. In short, the spell of the mythical precedent of the War Amendments seems to blind them to the realities of Article V. Was it not said that Dr. Johnson believed in the Cock Lane ghost but did not believe in the Eisbon earthquake?

Is it an unwarranted "stretch of power" to conclude that rejection by "all state legislatures" (to adopt Judge Jameson's own hypothesis) "should be taken to be definitive"? Why refer the question to the States at all, for "ratification or rejection,"† if, as in the latter-day plebiscites in Russia and Italy and

Hawke v. *Smith*, *supra*.
†*National Prohibition Cases*, *supra*.

Germany and Austria, only a decision one way is to be accepted?

The only unusual incident attending the adoption of the Fifteenth Amendment was the attempted withdrawal by New York of its earlier ratification. The proclamation of the adoption of the Amendment, by Hamilton Fish, Secretary of State,* named thirty States as having ratified and recited that New York, having first ratified, "claimed" to have withdrawn its consent. Without New York, there were ratifications from one more than three-fourths of the States and the question of the effect of New York's attempted withdrawal was therefore moot.

But it was the subject of a debate in the United States Senate in which Senator Garrett Davis, of Kentucky, spoke upon the question we have here. Davis had taken a prominent part in the public life of Kentucky for many years and was a member of the United States Senate from December 23, 1861, until his death on September 22, 1872. In opening his speech, he stated the position which he was about to defend:†

> "I agree—at least such is my conviction—that when any State by its Legislature has voted to adopt a proposed amendment to the Constitution it is no longer within the competence or power of that State to withdraw its ratification. But on the other hand, I say that there is an implied power which is correlative and coextensive with the power to ratify a proposed amendment and that is a power to reject any proposed amendments. I

*"Doc. Hist. of Const. U..S.," Vol. II, p. 893.
†Congressional Record, 41st Cong., 2nd Session, pp. 1479-1480.

admit that this is an implied power; but it is one that exists as unquestionably as the express power to ratify, in my judgment."

He expressed the opinion that it would have been wiser for Congress to have referred the question to State conventions instead of to State legislatures, and then continued:

"But I will hasten on, Mr. President. Now, this is the main proposition to which I was coming. The same thing exactly is submitted to a State Legislature or to a convention of the State. The two tribunals of the State, whether it be a legisture or a convention, have precisely the same power. The convention would have as much as a Legislature; a Legislature as much power over the subject as a convention; and neither would have any more power over the subject of a proposed amendment than the other would have—not one iota. * * *

"And here I take now my further position; that before each body the power would not only be of the same extent, but it would be exactly of the same continuance and duration. That, Mr. President, is an important proposition. It involves an important principle; it is the hinge upon which this question, in my judgment, turns. And what is the duration of the power? The Legislature acts until it has ratified; if it does not ratify the power continues until it acts to reject. The power to reject is in all respects parallel to the power to ratify. It is one of equal size, of equal force, of equal duration. It is the correlative, by necessary implication, of the power to ratify; and when the

act of rejection has taken place the power, the whole power, is then exhausted—as much exhausted as it would have been by a ratification by the same Legislature.

"Let us apply this argument to a convention of a State called to consider a ratification. . . . Now, suppose that in each State you had a convention organized and that convention had met to consider, say, the fifteenth amendment; conventions in all the States had been summoned in obedience to the legislation or resolutions of Congress to pass upon the fifteenth amendment, whether it should be ratified or rejected; those conventions got together, charged, as they might have been, especially with this isolated, particular, and constitutional power of acting upon the proposed amendment, and passed upon it and rejected it, and the conventions then adjourned (*sine die*) and went home, could anything be more unsound, anything more monstrously absurd, than that such a convention might be re-convened for the purpose of withdrawing its action of rejection of the proposed amendment and ratifying it? Sir, for any convention to have acted upon the subject in that form would have required special and particular language in the Constitution to authorize it.

"I agree with the honorable Senator from New York that this power is special; it is extraordinary; it does not appertain to the legislative powers of the States. So, too, the power to propose constitutional amendments does not appertain to the legislative powers of Congress. They are particular, extraordinary powers, made for a special and an isolated case. They are to be construed

strictly; and when they are executed they are powers that are gone forever, because their function has been exercised."

. . . . . .

"The honorable Senator's argument upon the first branch of his proposition I thought powerful and conclusive; but when he contended that this power of a State to act upon a proposed amendment to the Federal Constitution was a power to ratify, and imported no power to reject, I think he was widely from the true principle and widely from logic. How shall it be before a Legislature that has rejected it? How long shall it be an open question? Twenty years? Fifty years? How long? Where is there any principle or provision of the Constitution that would so protract the question before a State convention or State Legislature acting upon the subject of a proposed amendment? There is none. There is not a syllable of language from which such a power can be inferred. It does not exist. When the subject is submitted to a State for its action, it is but for one action. The action of acceptance is no more extensive than the action of rejection; it has no more validity or effect. The effect of either mode of action is to exhaust the power of the State over that proposed amendment, and it can never come before that State again in any form whatever unless it comes before it in the form of a new proposition to amend the Constitution."

This is the speech of a man who has considered his subject, has reached a reasoned conclusion and knows how to state it clearly and forcefully. It will be noted in how many particulars Senator Davis anticipated

the later decisions of this Court in construing Article V,—the non-legislative nature of the power of Congress to propose amendments and of state legislatures to take action upon them, the special character and constitutional origin of these powers, the functional identity of state legislatures and conventions, the limitation of the time for adoption.

Neither Judge Jameson nor any of his disciples, so far as we know, has ever taken up the challenge of Senator Davis by defending the position that a state convention, called to act upon a proposed amendment, could, after rejecting the proposal and adjourning *sine die*, reassemble at some future time and reverse its action. We think that the history and character of the Constitution excludes the supposition that such a policy of vacillation and procrastination was contemplated by the framers of Article V or that they would ever have countenanced it, had it been suggested. Judge Jameson himself, though conceding that "the powers and *disabilities*" of state legislatures and conventions, in respect to amendments, were "precisely the same", was not willing to say that a convention, like a legislature, might ratify after rejection.

In the fourth edition of his book he employed Governor Bramlette's analogy to the power of a legislature to repeal previous legislation (an analogy which he had ignored in his first edition) to bolster his assertion of the right *of a legislature* to ratify after rejection,* and both Mr. David K. Watson† and Mr.

*Jameson, "Const. Conventions," 4th ed., §581.

†"Constitution of the United States," Vol. II, p. 1318 (1920).

W. F. Dodd‡ (the latter with hesitation) have followed his lead.

But this analogy, though clearly inadmissible, would equally sustain the power of a legislature (or convention) to reject after ratification, a construction which has few, if any, supporters.

We submit that Senator Davis has the best of the argument. His interpretation, not only accords with the express terms of Article V, but precludes uncertainty as to the status of a proposal for amendment and discourages vacillation and procrastination in coming to a decision.

II.

THE PROPOSAL WAS DEFEATED IN 1925, UPON THE THIRTEENTH AFFIRMATIVE REJECTION.

By the end of the year 1925 the question of the ratification of the Amendment had been taken under consideration by the legislatures of thirty-nine States. The proposal had been assented to by four States, had been affirmatively rejected by both Houses of the legislatures in twenty-two States and by one House in nine additional States. In four States it had been negatived by adverse action of one or both houses of the legislatures on motion to ratify. The vote was, therefore, "Ayes" four, "Nays" thirty-five. It had been ignored in nine States, despite an active campaign for ratification on the part of the well organized

‡"Amending the Federal Constitution," XXX Yale Law Journal, 322.

group which had induced Congress to make the proposal.

Certainly, there can be no doubt that, at that time, the overwhelming sentiment of the country was opposed to the proposed grant of power to Congress. And that sentiment remained unchanged throughout the following seven years, or to the end of 1932, for during that time only five States acted on the Amendment, two ratifying and three affirmatively rejecting. During the calendar year 1932 the proposal had been completely ignored.

But, for the present, we take into account only the affirmative rejections of the proposal, of which there were thirty-one at the end of 1925 and thirty-four at the end of 1927. It is obvious that, if an affirmative rejection by a State is final and irrevocable, then the proposal was dead in 1925, since an irrevocable commitment of more than one-fourth of the States against the proposal would exclude the possibility of its approval by the required three-fourths.

But even if it be assumed, for the sake of the argument, that a State may change its position at any time before a decision has been reached, it does not follow that it may do so afterwards. Article V itself establishes this rule in cases where the decision is in favor of the proposal by declaring that a proposed amendment shall be valid as part of the Constitution when ratified by three-fourths of the States, thus closing the question at that time.

The question then is whether there can ever be an adverse "decision" upon such a proposal? Is it rea-

sonable to suppose that the authors of Article V intended that a question proposed for decision could be decided in only one way? Was it their intention that a proposal for amendment, despite storms of hostile opinion, should be condemned, like the "Flying Dutchman", to drift about the political seas forever?

We think that the very nature of the transaction requires a negative answer to this question and in support of this view we quote from an article by Mr. Frank W. Grinnell, of the Boston bar.* He says:

> "In the very recent unanimous opinion by Chief Justice Hughes in U. S. v. Chambers and Gibson, decided February 5, 1934, the court took 'judicial notice of the fact that the ratification of the twenty-first amendment which repealed the eighteenth amendment was consummated on December 5, 1933', and they cited the case of Dillon v. Gloss, 255 U. S. 368. December 5th was the date on which the thirty-sixth state voted to ratify.
>
> "Since the constitution requires a vote of three-fourths of the several states to ratify an amendment, it requires only one state more than one-fourth to defeat ratification and it seems to follow as a matter of common sense and orderly procedure from the decision just referred to that the rule must work both ways and that when thirteen states (one more than one-fourth of the forty-eight states) have voted not to ratify an amendment it is no longer pending, but is defeated until Congress sees fit to resubmit it. . . . If this is not so, states might be subjected to constant agitations over defeated amendments after the citi-

*"A 'Point of Order' on the 'Child Control' Amendment," Am. Bar Asso. Journal, July, 1934; reprinted in Mass. Law Quarterly, Aug., 1934.

zens considered them defeated and were off their guard."

If Article V had provided that only a majority vote of the States should be necessary for the adoption of an amendment, we suppose there would have been no question of the power of a majority to defeat such a proposal by votes of rejection. It would not then have been claimed, we surmise, that there should be a *locus poenitentiae* for members of the majority. The popular sentiment of the rightness of majority rule would doubtless have prevailed and there would have been a general acquiescence in the decision.

But the impotence of a majority to have its way might seem like a sort of minority rule. That situation had not arisen in the case of the Child Labor Amendment at the time when this suit was commenced but it had arisen in the case of the Fourteenth Amendment and it may be that the resentment of the dominant faction in Congress against the obstruction of their passionately cherished plans by a minority of the States was the soil in which the Bramlette-Jameson idea germinated.

It is well understood what important considerations induced the framers of the Constitution to require that changes in it should not be made unless they were supported by a greatly preponderant public conviction of their desirability. The philosophy of that requirement was thus expressed by President Hadley of Yale:*

*Arthur Twining Hadley, "Standards of Public Morality."

"Not content with saying that all just government is based on the consent of the governed, the enthusiastic advocates of democracy hold that if you could only find what a majority of the governed wanted you could easily incorporate it into law. Never was there a greater practical error. Public law, to be effective, requires much more than the majority to support it. It requires general acquiescence."

The point under consideration is admirably stated in the following excerpt from an article* by Mr. Thomas F. Cadwalader, of Baltimore:

"As to the finality of thirteen actual rejections by legislatures capable of acting there should be little difference of opinion. Any other rule would subject every one of the dissident states to a weight of political pressure entirely out of harmony with the principle that law is legitimately made and constitutions are legitimately altered only by the voluntary concurrence of the law-making or amending bodies. If we are willing to stand by the principle that the action of three-fourths of the states is necessary to amend the federal compact we must concede to a dissident minority that may only barely exceed one-fourth the right to their opinion, free from any external pressure amounting to force, fear, calumny or corruption. The majority need not rely on these things. By hypothesis they control two-thirds of Congress and nearly three-fourths of the states. It is easily in their power to resubmit any amendment as often

*"Amendment of the Federal Constitution," LX Am. Law Review, 389.

as they may please. The minority can only insist that in view of their dissent the matter be again submitted by the Congress to all the states. It is similar to the case of a treaty rejected by more than one-third of the Senate, to a bill defeated by a small majority in one house and passed overwhelmingly by the other, or, to take an even more familiar example, the failure of a jury to agree on a verdict. Even the Parliament Act, which is said to have reduced the House of Lords to impotence, left them with the power to compel the re-enactment by the Commons of any bill they might reject."

In concluding our argument on this point, we suggest that, in the academic discussion of this subject, there has been an unjustified pother over the meaning of the plain language of Article V as to the point in question. The sense of the people of the States was to be taken on proposals for amending the Constitution. This was to be accomplished by the submission of such a proposal to representative assemblies in the States. The decision of the States was to control. Ratifications had to be mentioned because it was necessary to state the requirement that, in order to accomplish the adoption of the proposal, ratifications by three-fourths of the States must be secured. The omission to mention rejections seems to us to have no significance. The right to reject was clearly implied. To deny it, Judge Jameson said, would be "puerile."

The requirement of the consent of three-fourths of the States for the adoption of an amendment was per-

haps the most important of the checks provided against hasty and ill-considered action. It was intended to make sure that only such changes are made as are supported by heavily preponderant public opinion. It provides a plan for obtaining a contemporaneous expression of opinion. If a proposal is defeated even by a minority of the States, the purpose of the Article is served.

III.

THE PROPOSAL WAS NOT PENDING BEFORE THE STATES IN JANUARY, 1937, WHEN THE KENTUCKY LEGISLATURE ATTEMPTED TO RATIFY.

The point we make here is that, when the Kentucky legislature attempted to ratify the Child Labor Amendment, the proposal had been so long before the States without adoption that it must be considered as being no longer open to ratification and that consequently the power of a State legislature to act on the proposal had expired. Upon this point we are able to quote Judge Jameson as giving some support to our position. In his fourth edition, in speaking of the power of ratification, he said;*

> "The better opinion would seem to be that an alteration of the Constitution proposed today *has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to*

*Op. cit., *supra*, §585.

be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress."

. . . . . .

"We discuss this question here merely to emphasize the dangers involved in the Constitution as it stands, and to show the necessity of legislation to make certain those points upon which doubts may arise in the employment of the constitutional process for amending the fundamental law of the nation. *A constitutional statute of limitation, prescribing the time within which proposed amendments shall be adopted or be treated as waived, ought by all means to be passed."* (All italics ours.)

When the proposal of the Eighteenth Amendment was under consideration in Congress, it was suggested that a time be fixed when the proposal should be considered as defeated, if it were not sooner ratified by the requisite number of States. The first proposal was that a limitation of six years should be adopted. Thereupon, the persons engaged in the manufacture of alcoholic beverages requested that the amendment be so drawn as to make it effective one year after its adoption, in order that they might have a reasonable time for adjustment after it was certain that their business must be wound up. This was agreed to and that proposal provided that the amendment should not become effective until one year after adoption.* The proponents of the Amendment then urged that, since the "liquor interest" was to have one year for winding up

*Dillon v. Gloss, supra.

in the event of the adoption of the Amendment, they ought to have another year in which to conduct their campaign for adoption and, while there seemed to be no logical connection between the two things, both suggestions were agreed to and the time allowed for adoption was fixed at seven years instead of six.†

After the proposal of the Eighteenth Amendment a resolution was offered in the Senate for the proposal of another Amendment, fixing six years as the time in which all amendments must be adopted. It was favorably reported by the committee to which it had been referred but appears to have been abandoned, possibly because of the decision in *Dillon* v. *Gloss,* which came about a year later.

In that case, the validity of the Eighteenth Amendment was challenged upon the ground that the limitation of the time for adoption was beyond the power of the Congress and that consequently the proposal, and necessarily all steps taken pursuant thereto, were void. In discussing this subject this Court made the following important statement:

> "We do not find anything in the Article which suggests that an amendment, once proposed, is to be open to ratification for all time, or that ratification in some of the states may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary. First, proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being

†Cong. Rec. 65th Cong., 1st Sess. 5648-5653, 5658-5661; 2nd Sess. 423-446, 463-478.

that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in the three-fourths of the states, there is a fair implication that it must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period, which, of course, ratification scattered through a long series of years would not do. These considerations and the general purport and spirit of the Article lead to the conclusion expressed by Judge Jameson 'that an alteration of the Constitution proposed to-day has relation to the sentiment and the felt needs of to-day, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress.' That this is the better conclusion becomes even more manifest when what is comprehended in the other view is considered; for, according to it, four amendments proposed long ago—two in 1789, one in 1810-and one in 1861— are still pending and in a situation where their ratification in some of the states many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more states to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable. We conclude that the fair inference or im-

plication from Article 5 is that the ratification must be within some reasonable time after the proposal."

"Of the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt. As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require; and Article 5 is no exception to the rule. Whether a definite period for ratification shall be fixed, so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification. It is not questioned that seven years, the period fixed in this instance, was reasonable, if power existed to fix a definite time; nor could it well be questioned considering the periods within which prior amendments were ratified."

In addition to the authority of this case, we have, in the Congressional debates of recent years, evidence of a strong, if not prevailing, opinion among members of Congress that seven, or even six, years would be a long enough time to allow for the adoption of an amendment. Since the decision in *Dillon* v. *Gloss,* two proposals for amending the Constitution (since adopted as the Twentieth and Twenty-first Amendments) each contained a limitation of seven years. And it will be noted that no distinction, with regard to a time limit for adoption, has been made between ratifications by

legislatures and ratification by conventions, the latter method having been adopted, for the first time, in the case of the Twenty-first Amendment.

The validity of the limitation provided in the proposal of the Eighteenth Amendment was upheld in the *Dillon Case*. The validity of similar limitations in the proposals of the Twentieth and Twenty-first Amendments has never been called in question, although other aspects of the Twenty-first Amendment were under consideration in *United States* v. *Chambers*, 291 U. S. 217, 54 S. Ct. 434, 78 L. Ed. 763, 89 A. L. R. 1510.

A period of twenty years has now elapsed since the proposal of the Eighteenth Amendment, in which for the first time the seven-year limitation was introduced. The question of fixing a maximum time for adoption of a proposal for amendment had been debated in Congress before that time. In all of the debate on this subject, six or seven years had been the limitation usually suggested. Thus, for some years before this Court spoke in the *Dillon Case*, Congress itself had given indications of a belief that Article V contemplated that the adoption of an amendment should follow within a comparatively short time after its proposal and in the proposal of the Eighteenth Amendment it had acted upon that belief. After the Court had approved its action, in *Dillon* v. *Gloss*, Congress, in the instances of the Twentieth and Twenty-first Amendments, followed the course which the Court had approved.

DILLON v. GLOSS, REVIEWED.

The significance of the decision in the *Dillon Case* has been the subject of much discussion and some controversy among the professorial Pundits of the law. Within a few months of the handing down of that decision Professor Freund tilted a lance at the Court, barbed with the accusation that it had "decided a case that was not before it" and had "discussed and established a purely academic proposition".* This accusation was based upon the supposition that the Court had overlooked the fact that the seven-year limitation in the proposal of the Eighteenth Amendment was not a part of the Congressional resolution but was part of the Amendment itself. This differentiation has always seemed to us somewhat illusory. Congress undoubtedly proposed the Amendment and, if the limitation was part of the Amendment, then Congress proposed the limitation. This was what Dillon complained of, claiming that Congress had no power to make a proposal in that form. Whether or not Congress had that power was the question which this Court considered and determined. Although there are still some echoes of Professor Freund's challenge,† an abandonment of the point is suggested in the concluding paragraph of his article:

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*Ernst Freund, "The Prohibition Amendment and Consent Requirements and Time Limits," 7 Am. Bar Asso. Journal, 656 (Dec., 1921).

†See "The Child Labor Amendment and the Amending Process," LXXII United States Law Review, p. 162 (Mar., 1938).
Lester B. Orfield, "Reform of the Federal Amending Power," X, No. Carolina Law Review, p. 24 (Dec., 1931).

"But a future Congress will be justified in relying upon the decision, and the practice of attaching time limits to submit resolutions may come to be adopted."

It has been pointed out, and it is, of course, true, that the facts of the *Dillon Case* were very different from the facts of this case. In the proposal of the Prohibition Amendment. Congress had adopted a time limit, whereas it did not do so in the proposal of the Child Labor Amendment. But there remains the question how much this difference affects the pertinence of the doctrine of the *Dillon Case* to this case.

In the *Dillon Case* the Court did not hold, as we read its opinion, that Congress had the power, *sponte suâ*, to adopt the policy of limiting the time within which a proposal for amendment may be adopted. It held that that policy was embodied in Article V itself. The only power which it conceded to Congress was that of aiding the enforcement of the requirement of Article V that adoption follow proposal within a reasonable time by fixing a definite time for that purpose.

Not only the statements found in the opinion but its arrangement are to be noticed. After a reference to the four proposals for amendment of the Constitution which had never been adopted as showing "the circumstances in the light of which Congress, in proposing the 18th Amendment, fixed seven years as the period for ratification", the Court said:

"Whether this could be done was questioned at the time and debated at length, but the prevail-

ing view in both Houses was that some limitation was intended and that seven years was a reasonable time."

The Court then summarized the provisions of Article V and, having noted certain indications of intention found in that Article, said:

> "We conclude that the fair inference or implication from Article 5 is that the ratification must be within some reasonable time after the proposal."

Up to this point in its exposition of the subject, the Court had made no reference to any power in Congress to limit the time for ratification of a proposed amendment. It had confined itself to a construction of Article V and had reached the conclusion stated above, to-wit, that the requirement of adoption of an amendment within a reasonable time after its proposal was implied in that Article. Having established that foundation, it proceeded to examine the question whether Congress had the power to aid the enforcement of this implied limitation by fixing a definite period for adoption of the proposal. After saying that "as a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interest and changing conditions may require", it added:

> "Whether a definite period for ratification shall be fixed, so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which

Congress may determine as an incident of its power to designate the mode of ratification."

It then declared that the period of seven years fixed in that instance was reasonable, a conclusion which could not well be questioned "considering the periods within which prior amendments were ratified."

We submit that the doctrine of the *Dillon Case* supports our position in this case, in so far as it establishes the fact that Article V itself limits the time within which a proposal for amending the Constitution can be acted upon by the States. We admit that it puts upon us the burden of showing that the attempted ratification of the Child Labor Amendment by the Kentucky legislature did not come within a reasonable time after the proposal of that Amendment and we now address ourselves to that question.

It has been said that, while this Court, in the *Dillon Case,* declared that the period of seven years fixed in the proposal of the Eighteenth Amendment was not too short, in view of the much shorter time in which all other amendments had been adopted, it has never said what time would be too long. Taken literally, this is quite true, although we do not concede that the Court's approval of a limitation of seven years can be ignored. On the contrary, we think it must be given some weight in determining the effect of the declarations made by the Court in that case that ratifications widely separated in time were not contemplated by the framers of the Constitution, that a proposal for amendment is "to be considered and disposed

of presently" and that ratifications in three-fourths of the States, to be effective, "must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period."

In considering this question, in a case where Congress itself has not fixed a time limit, it is necessary to take all circumstances into account. What might be a reasonable time in one case might not be a reasonable time in another case. Let us suppose that a proposal for an amendment of the Constitution should be immediately followed by some great national calamity or a succession of calamities, whether of war or of pestilence or of famine or other misfortune, so that public interest in the proposed amendment had been eclipsed by the absorbing necessity of meeting these misfortunes and solving the problems consequent upon them, with the result that no attention had been given to the proposal, that no discussion or agitation for or against it had taken place during that time and that no action at all had been taken. In those circumstances, it might, perhaps, be said that a renewed interest in the subject, even after the passage of some years, followed by ratifications by three-fourths of the States within a period of three or four years, would not be too late, although, even in that situation, a resubmission by Congress might be necessary.

But we note how different is the case of the Child Labor Amendment. We ask the Court to look at the table at the end of this brief (Appendix A), in order to

get the history of the Child Labor Amendment at a glance. It shows that at the end of a year and a half after its proposal it had been considered and acted upon by 39 States. The verdict against it at that time was overwhelming, 35 "Nays" to 4 "Ayes". Seven years later, at the end of 1932, or eight and a half years after its proposal, 42 States had acted upon it and the vote was 38 "Nays" and 4 "Ayes", or, if the attempted reversals of position by Colorado and Montana are allowed, as claimed by Petitioners, 36 "Nays" to 6 "Ayes".

Can it be said, in view of this record, that, either at the end of 1925 or of 1932 or of any intervening year, the proposal had not been "considered and disposed of presently"? Can it be said that, "the sentiment and felt needs" of that day had not been fully demonstrated? It must be remembered that during that time no public calamity nor any overwhelming absorption in other problems had intervened to interrupt or distract attention from the consideration of this proposal. The total collapse of interest in it by the end of 1932 or, indeed, by the end of 1927, had been due solely to the fact that the action theretofore taken by 42 of the 48 States in the Union and the refusal to act by the remaining 6 States, had resulted in a universal conviction that the proposal had been overwhelmingly defeated and was no longer open to consideration. We can hardly conceive a more complete demonstration of almost universal hostility. It seems to us that, if this situation does not justify the

application of the rule that a proposal for amendment, if not adopted "within some reasonable time after the proposal", "ought to be regarded as waived and not again to be voted upon, unless a second time proposed by Congress", then the application of that rule can never be justified.

REPLY TO BRIEF FOR PETITIONERS.

In the main, the arguments advanced in the Brief for Petitioners in support of their assignment of errors have been anticipated by the foregoing argument in support of the judgment below and we shall not vex the ear of the Court by repetition. But there are one or two points to which we wish to say something by way of comment or explanation.

In a foot-note to Petitioners' "Statement of the Case" (Brief, p. 7) there appears a table, entitled, "Action in Child Labor Amendment by State Legislatures as Shown by Records of U. S. Department of State." A comparison of this tabulation with that found in "Appendix A" in this brief will, at first glance, seem to show many discrepancies but, upon a more careful scrutiny, it is seen that this appearance is deceptive. Both tables are accurate (or substantially so) but are compiled upon different bases. For one thing the record furnished by the Department of State includes, of course, only actions that have been certified to that Department, whereas our table contains adverse actions which were not so certified but

which are matters of public record. For example, the Department reports only 19 rejections in 1925, whereas our table shows 32. As has been explained above (pp. 4 and 36), the latter total is made up as follows: 20 affirmative rejections by both Houses (4 of them not certified), 9 affirmative rejections by one House (no action in other House), and 3 defeated resolutions to ratify. Thus it is seen that the two tables tally, since the affirmative rejections by one House and the defeated resolutions to ratify were not certified to Washington. So the two tables are reconciled down to the year 1933. In the five years, 1933-1937, the table of the Department of State (Petitioners' brief, p. 7) shows 21 ratifications, bringing the grand total to 27, whereas Appendix A gives 22 ratifications during that five-year period, bringing the grand total to 28. This discrepancy is due to the fact that we have given credit for 4 ratifications in 1937, including both Kansas and Kentucky, whereas the Department's table omits Kansas, since that attempted ratification has not been certified to the Department.

The great difference between the two tabulations is with respect to rejections in the five-year period, 1933-1937. The Department's table gives only one rejection in that period, whereas our table shows 57 rejections. Of course, this total contains many duplications. During that time, Massachusetts rejected the proposal five times, after having rejected it in 1925; Texas and South Dakota rejected it four times, after having rejected it in 1925; New York rejected it four times;

Florida and Missouri rejected it three times, after having rejected it in 1925; Maryland rejected it three times after having rejected it in 1927; Rhode Isand rejected it three times; Connecticut, Louisiana, Nebraska, North Carolina and South Carolina rejected it twice, after having rejected it in 1924 and 1925; Delaware, Georgia, Tennessee, Vermont and Virginia rejected it once during the last five years, after having rejected it in 1925; Alabama rejected it in 1935, through adverse committee action on a resolution to ratify.

None of the twenty States last mentioned has ever ratified the proposal. During the last five years, six States, Kansas, Kentucky, Nevada, New Mexico, Utah and Wyoming, although finally ratifying, first repeated their rejections of a decade or more ago, some of them two or three times. In 1933, when the pressure for ratifications was first exerted by a new and popular administration in Washington, 14 ratifications were obtained, in contrast with 9 rejections. But in 1934, there were no ratifications and 11 rejections; in 1935, 4 ratifications and 20 rejections; in 1936, no ratifications and 6 rejections, and in 1937, 4 ratifications and 12 rejections.

It will be noticed that in both tables actions taken during the year 1937 are included, although some of these did not take place until after the institution of this action and, therefore, do not appear in this record. While this is somewhat irregular, we trust that the Court will overlook it, since both sides are similarly at

fault. The purpose, upon both sides, was to give the Court as complete a picture as possible of the action taken by the States at the time when this Court took jurisdiction of the case.*

That portion of Appendix A which gives the record of action by the States during the five-year period, 1933-1937, is inserted to show the result of the drive for ratifications which commenced in 1933 and has continued until this time. Although we take the position that all action taken by the States during this period is ineffectual because the proposal was no longer pending at the opening of that period, we think the showing is illuminating as to persistence of hostility to the Amendment despite all proselytizing efforts.

In the brief for Petitioners, counsel take the following position in applying the rule of reasonable time laid down in the *Dillon Case*. We quote from that brief:

> "Frequent action by the legislatures of the several states with respect to a proposed amendment should be considered as keeping the proposal alive. If only a reasonable time expires between action on the proposal by one legislature and action on the proposal by another legislature, and that process continues until a large number of legislatures —less than thirty-six—have acted, then it seems reasonable that the proposal has not terminated by the elapse of time even though a period of several years has expired between the action of the

*Substantially all of the results shown by Appendix A are supported by averments in the first amended petition (R. 9) and the second amended petition (R. 12). The truth of these averments stands confessed, since the record contains no denial of their truth.

first state and the action of the last state. If a period of several years expires between the action by one legisalture on the proposal and the action by the next legislature on the proposal, then it may be considered that the proposal has terminated by the elapse of time. Also, if a period of several years has expired since the action by the last state, and the number of states having ratified is less than thirty-six, then it may be considered that the proposal has terminated by the elapse of time. Applying these principles to the proposed Child Labor Amendment we find that three years is the longest period of time that has expired during which there was no action on the proposal by any legislature. It is submitted that three years is too short a time to constitute such a period of time as would terminate the pendency of the proposed amendment."

We note in passing that upon this theory a proposal for amendment might conceivably be kept alive for many years. If, for example, there was one action every other year, the proposal would still be pending at the end of seventy years, even if all actions were ratifications; if the interval between actions was two years, it would still be pending at the end of a century, and so on.

This argument seems to us to be subject to the same criticism as the argument made by Judge Allen, of the Supreme Court of Kansas, in writing the opinion of the Court in *Coleman* v. *Miller, supra,* now under review by this Court (No. 7, October Term, 1938). In discussing the claim (to use his own words) "that the proposed amendment [Child Labor Amendment] has

lost its potency by old age," Judge Allen, after quoting at length from Judge Jameson, explained his reason for rejecting that claim as follows:

> "The history of the agitation over the child labor question since the proposed amendment is a matter of common knowledge. We have no concern with the wisdom of the proposed amendment, but of necessity must hold that the proposal 'has relation to the sentiment and felt needs of today' which seems to be the criterion adopted by the Supreme Court in Dillon v. Gloss. We therefore hold the proposed amendment retains its original vitality, and that the assent of the legislature was legally manifested by the adoption of Senate Concurrent Resolution No. 3."

We think that Judge Allen and counsel for Petitioners in this case have fallen into the same error. It will be noted that Judge Allen, in quoting from the opinion of this Court in the *Dillon Case* the phrase, which he refers to as "the criterion adopted by the Supreme Court," has omitted a very vital portion of the expression actually used by this Court. The criterion thus attributed to the Court (and it is only one of several criteria mentioned in the Dillon opinion) is stated in that opinion as follows:

> "An alteration of the Constitution PROPOSED TODAY has relation to the sentiment and the felt needs of TODAY." (Emphasis added.)

This means, of course, public sentiment as of the time when the Amendment was proposed and not the

public sentiment of a time twelve or fifteen years later. It was the sentiment of 1924, and not the sentiment of 1937 or 1938 or 1940, that was to be ascertained by the referendum of the proposal to the States. That sentiment—the sentiment of 1924—was overwhelmingly expressed within a year and a half after the proposal. At that time (to repeat what we have said so often) the proposal had been ratified by only 4 States and had been rejected by 35 States. We submit that this was conclusive and that, if it was desired twelve or fifteen years later to ascertain what the sentiment of the States was *at that later time,* it could be authorized only by a re-submission of the question by Congress.

CONCLUSION.

We would have preferred to make this brief much shorter than it is. Its length can be justified only by the novelty of the questions involved and by the paucity of judicial precedents. We have endeavored to bring to the attention of the Court, without concealment or undue partiality, such material as we have thought might assist the Court in reaching a correct conclusion.

It is hardly necessary to urge the public importance of an authoritative settlement of the doubts which have given rise to this litigation and to much of the legal literature mentioned above and set out more fully in Appendix E. Its importance is, we think, apparent. The ferment of ideas upon social, economic and politi-

cal problems which characterizes this time, particularly as to the part which government should take in the solution of those problems, makes it peculiarly important that the requirements for effecting a change in the division or extension or limitation of governmental powers established by the Constitution should be clearly understood and faithfully observed. If, as some think, the existing method of amending the Constitution should itself be amended, certainly it is important to know exactly what the existing method is.

Without more, we offer our argument in favor of the following interpretation of Article V of the Federal Constitution:

That when a State takes affirmative action on a proposal for amendment of the Federal Constitution, whether by ratifying or rejecting it, its power is exhausted and its action upon that proposal cannot be retracted:

That when more than one-fourth of the States have affirmatively rejected such a proposal, the fate of that proposal is determined as conclusively as it would have been if three-fourths of the States had ratified it, even if a State had the power, prior to such determination, to reverse the action theretofore taken by it:

That, in view of the history of the proposal of the Child Labor Amendment before the States, a reasonable time for its adoption had expired and it was no longer pending or open to action by any State at the time when the Kentucky legislature attempted to ratify the proposal, even though its original power to act

had not theretofore been exhausted by the first exercise thereof nor had been terminated by the antecedent defeat of the proposal by the adverse votes of more than one-fourth of the States.

We ask that the judgment of the court below be affirmed.

Respectfully submitted,

LAFON ALLEN,
OLDHAM CLARKE,
Solicitors for Respondents.

October 1, 1938.

APPENDICES.

Appendix A.: Table showing action by States on Child Labor Amendment, 1924-1937, inclusive 1– 2

Appendix B.: Federal Constitution, Article V; Act of Congress, April 20, 1818. 3

Appendix C.: Resolution of Kentucky legislature, March 24, 1926, rejecting Child Labor Amendment 4– 5

Appendix D.: List of recent legal literature on constitutional amendment 6–10

APPENDIX A.

ANNUAL RECORD OF ACTION BY STATES ON CHILD LABOR AMENDMENT, PROPOSED JUNE 2, 1924: 1924 TO 1937, INCLUSIVE.

NOTE: "Annual Totals" show number of States acting in each year.
"Respondents' Cumulative Totals" include only first action of States to end of each year, excluding all reversals of position.
"Petitioners' Cumulative Totals" include ratifications to end of each year, excluding all former rejections.

X indicates ratification; O indicates rejection.

	1924		1925		1926		1927		1928		1929		1930		1931		1932		1933		1934		1935		1936		1937	
	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No	Aye	No
Alabama																								O				
Arizona			X																									
Arkansas	X																											
California			X																									
Colorado				O											X													
Connecticut				O																				O				O
Delaware				O																				O				
Florida				O																O				O				O
Georgia		O																						O				O
Idaho				O																			X					
Illinois																			X									
Indiana				O*	*(Thirteenth affirmative rejection, March 5, 1925)																		X					
Iowa				O															X									
Kansas				O																O		O		O		X		
Kentucky						O																O				X		
Louisiana		O																				O			O			
Maine				O															X									
Maryland								O												O				O				O
Massachusetts				O																O		O		O		O		O
Michigan				O															X									
Minnesota				O															X									
Mississippi																						O				O		
Missouri				O																O				O				O
Montana				O			X																					
Nebraska				O																				O				O
Nevada				O																				O		X		
New Hampshire				O															X									
New Jersey																			X									
New Mexico				O																		O		O		X		
New York																						O		O		O		O
North Carolina		O																						O				O
North Dakota				O															X									
Ohio				O															X									
Oklahoma				O															X									
Oregon				O															X									
Pennsylvania				O															X									

Georgia		O																							O				O					
Idaho				O																					X									
Illinois																					X													
Indiana				O*	*(Thirteenth affirmative rejection, March 5, 1925)																				X									
Iowa				O																	X													
Kansas				O																		O		O		O			X					
Kentucky						O																		O					X					
Louisiana		O																						O			O							
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Nevada				O																								O		X				
New Hampshire				O																	X													
New Jersey																					X													
New Mexico				O																				O		O			X					
New York																								O		O		O		O					
North Carolina		O																								O				O				
North Dakota				O																	X													
Ohio				O																	X													
Oklahoma				O																	X													
Oregon				O																	X													
Pennsylvania				O																	X													
Rhode Island																								O		O		O						
South Carolina				O																				O		O								
South Dakota				O																		O				O				O				
Tennessee				O																						O				O				
Texas				O																		O		O		O				O				
Utah				O																		O			X									
Vermont				O																						O								
Virginia						O																		O										
Washington				O																	X													
West Virginia				O																	X													
Wisconsin			X																															
Wyoming				O																		O			X									
ANNUAL TOTALS:	1	3	3	22	0	2	1	1	0	0	0	0	0	0	1	0	0	0	14	9	0	11	4	20	0	5	4	12						
Respondents' Cumulative Totals:	1	5	4	35	4	37	4	38	4	38	4	38	4	38	4	38	4	38	6	38	6	41	6	42	(All States In)									
Petitioners' Cumulative Totals:	1	3	4	35	4	37	5	37	5	37	5	37	5	37	6	36	6	36	20	24	20	26	24	24	24	24	28	20						

("Rejections," indicated by O include all adverse action, whether affirmative rejection by both houses of a legislature, affirmative rejection by one house, defeat in one or both houses of motions to ratify, etc. For the years 1924-1932, inclusive, the classification of these rejections according to their nature is shown on pages 4 and 36 of the brief.)

APPENDIX B.

Federal Constitution, Article V:

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which in either Case shall be valid to all Intents and Purposes as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner effect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

Act of Congress of April 20, 1818

(U. S. Rev. Stats., §205, 5 U. S. C. A., §160):

"160. Amendments to Constitution. Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States."

APPENDIX C.

ACTS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF KENTUCKY 1926

CHAPTER 345; SENATE RESOLUTION No. 12.

"A Concurrent Resolution providing for the rejection of the proposed twentieth amendment to the Constitution of the United States, being the so-called child labor amendment to said Constitution.

"Whereas, the Congress of the United States has proposed an amendment to the Constitution of the United States of America in the following words, to-wit: 'Joint resolution proposing amendment to the Constitution of the United States of America in Congress assembled, two-thirds of each House concurring therein, that the following article is proposed as an amendment to the Constitution of the United States, which when ratified by the legislatures of three-fourths of the several states, shall be valid to all intents and purposes as a part of the Constitution.

" 'Section 1. That Congress shall have power to limit, regulate and prohibit the labor of persons under eighteen years of age.

" 'Section 2. That power of the several state is unimpaired by this article except that the operation of the state laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress,' and

"Whereas, in the opinion of the majority of the members of the General Assembly of Kentucky, said proposed measure violates the principle of local self-government, inasmuch as the states are asked to surrender a power which is peculiar to the states, and

"Whereas, in the opinion of the members of the General Assembly of Kentucky, there can be no real liberty where such important personal rights may be limited, reg-

ulated and prohibited to the extent proposed in the twentieth amendment to the Constitution of the United States in which it is sought to give Congress the power to enter the homes for the purpose of regulating the child life, even to the extent of actually prohibiting all labor of persons under eighteen years of age; therefore,

"Be it resolved by the Senate of Kentucky, the House of Representatives concurring therein:

"§1. That the said proposed Amendment to the Constitution of the United States of America be, and the same is hereby rejected by the General Assembly of the Commonwealth of Kentucky.

"§2. That certified copies of this Concurrent Resolution be forwarded by the Governor of this Commonwealth of the Secretary of State in Washington, D. C., and to the Presiding Officer of the United States Senate and the Speaker of the House of Representatives of the United States."

"Approved March 24, 1926."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 14.

ALBERT BENJAMIN CHANDLER, Individually and as Governor of the Commonwealth of Kentucky, Et Al., - - - - - - Petitioners,

versus

JAMES E. WISE and RAY B. MOSS, - - Respondents.

BRIEF FOR RESPONDENTS

IN REPLY TO

"BRIEF FOR THE UNITED STATES AMICUS CURIAE,"

"BRIEF AMICUS CURIAE ON BEHALF OF THE STATE OF WISCONSIN" AND

"BRIEF ON BEHALF OF RESPONDENTS," *COLEMAN, ET AL., v. MILLER, ET AL.*, October Term, 1938, No. 7.

LAFON ALLEN,
OLDHAM CLARKE,
Both of Louisville, Kentucky,
Attorneys for Respondents.

March, 1939.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

No. 14 — October Term, 1938

Reply Brief for Respondents

ERRATUM

Page 23, fourth line from top:

"Eighteenth" should be "Fourteenth".

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 14.

ALBERT BENJAMIN CHANDLER, INDIVIDUALLY AND AS GOVERNOR OF THE COMMONWEALTH OF KENTUCKY, ET AL., - - - *Petitioners,*

v.

JAMES E. WISE AND RAY B. MOSS, - *Respondents.*

REPLY BRIEF FOR RESPONDENTS.

At the time of the filing of our original brief (October 1, 1938), we had seen neither the "Brief for the United States Amicus Curiae" nor the "Brief Amicus Curiae on Behalf of the State of Wisconsin," both filed herein. Nor had we then seen "Brief on Behalf of Respondents," filed in the companion case from Kansas, No. 7, October Term, 1938, *Coleman, et al.*, v. *Miller, et al.* The order for a re-argument of the case gives us the first opportunity to respond to these briefs.

Stated broadly, the questions discussed in the briefs heretofore filed are these:

Are the people of the United States, who established the Constitution[1] and to whom was reserved the ultimate power to decide whether or not it should be changed,[2] powerless to make an effective decision against a proposal to change it?

Was it intended by the framers of the Constitution that a proposal by Congress for amending that instrument should survive an overwhelming demonstration of popular disapproval, expressed through representative assemblies in the States of the Union to which the question of amendment was required to be submitted for final decision?

Was it intended that, despite such public hostility, the proposal should remain open to acceptance *in perpetuum* or, to adopt a figure of speech from our original brief, was such a proposal, despite storms of adverse opinion, condemned, like the "Flying Dutchman," to drift about the political seas forever?

There are, of course, subsidiary questions, but, in the last analysis, these are the questions to which an answer must be found.

A great deal of nonsense has been written on this subject, as was perhaps to be expected from commentators who, having no clear precedent to guide them and being free from that sobering sense of responsibility which affects the judgment of a court, are prone to seize upon faint analogies and other "nice sharp quillets of the law" to sustain their conjectures. All

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[1] *McCulloch* v. *Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Dillon* v. *Gloss*, 256 U. S. 368, 41 S. Ct. 510, 65 L. Ed. 994.

[2] *Hawke* v. *Smith*, 253 U. S. 221, 40 S. Ct. 495, 64 L. Ed. 1504.

such catchpenny arguments we would put aside, in the very beginning, believing them to be unworthy of serious consideration. Great as is the respect due Judge Jameson's views on questions of constitutional law, it must be admitted, we think, that he is responsible for the currency of some of these frail analogues and precedents, which, through constant repetition, have come to have a sort of ritualistic importance in the eyes of his disciples.

In this category we place the following incidents and statements, so often encountered in the literature of this subject:

The correspondence between Madison and Hamilton on the admissibility of "conditional ratifications" of the Constitution itself:[1]

The coming into the Union of North Carolina, after having adopted a resolution "neither to ratify nor reject the Constitution" until certain additions were made to it:[2]

Chief Justice Marshall's declaration in *Fletcher* v. *Peck*[3], that "one legislature cannot abridge the powers of a succeeding legislature, ... so far as respects general legislation," made in a case involving (and sustaining) the title to lands in Georgia which Fletcher had obtained by conveyance from Peck, the original grantee from the State of Georgia, under an enabling act, the repeal of which was subsequently attempted:

---

[1] "Works of Hamilton," Vol. I, 463.
[2] IV Elliot, 242.
[3] 6 Cranch, 87.

Certain cases (*Society for Savings* v. *City of New London*,[1] *Woodward* v. *Board of Supervisors*[2] and *Calhoun County* v. *Galbraith*[3]), upholding the validity of municipal bond issues which, while failing to be approved at an earlier election, were approved upon a new submission of the question:

New Jersey's superfluous reversal of its position on the Thirteenth Amendment, from rejection to ratification, after that Amendment had been proclaimed as part of the Constitution upon the basis of ratifications by the requisite number of States, not counting New Jersey:

New York's attempted withdrawal of its ratification of the Fifteenth Amendment, mentioned in the proclamation of Hamilton Fish, Secretary of State of the United States, showing ratifications by more than three-fourths of the States, without counting New York.[4]

And we add to these the apprehension of the Solicitor General, in this case, that an affirmance of the judgment below might "carry with it the present downfall of the Fourteenth Amendment."[5]

The foregoing events and expressions of opinion are, we think, too remote or too tenuous to justify further notice. We proceed, therefore, to a consideration of the question first above stated, with special reference to other arguments advanced in the amicus briefs referred to above as having been filed after the filing of our original brief.

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[1] 29 Conn. 174.
[2] 2 Central Law Journal, 396.
[3] 7 Otto, 214; 25 Law Ed. 410.
[4] 2 Documentary History of the Constitution, 893.
[5] Amicus Brief for United States, p. 5.

We realize, of course, that the answer to that question must be found in the Constitution itself. But we anticipate that the Court, as in the past, will seek and find the answer, not in the letter, which killeth, but in the spirit, which maketh alive.

ARE AFFIRMATIVE REJECTIONS UNAVAILING?

Judge Jameson, in the first edition of his book, said (for even Homer sometimes nods) that, since "rejection" of a proposal to amend the Constitution was not mentioned in Article V, "it would seem a stretch of power" to read the word into that Article and concluded, therefore, that the rejection of such a proposal, even by all of the States, could not "be taken to be definitive."[1] The Attorneys General of Kentucky, of Kansas and of Wisconsin adopt this conclusion.[2] The Solicitor General of the United States, using a more modern idiom, says that "the concept of rejection is not to be found" in Article V and that "rejection is, therefore, an extra-constitutional concept."[3] An affirmative rejection of a proposed amendment or a failure or refusal to pass a resolution of ratification, he says, "are all constitutionally neutral events."[3]

Judge Jameson leaves us room for argument. To his assertion that rejection is not allowed because it is not mentioned, we can respond that it is implied in the

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[1]Jameson, "The Constitutional Convention," §563, 1st ed.

[2]Brief for petitioners, *Chandler* v. *Wise*, p. 12 *et seq.*;
Brief for respondents, *Coleman* v. *Miller*, p. 6 *et seq.*;
Amicus Brief for State of Wisconsin, p. 3.

[3]Amicus Brief for U. S., p. 11.

power to decide. But the Solicitor General is unanswerable. He does not say, as Judge Jameson did, that the idea of rejection is not in the Constitution because *the word* is not there. He says that the idea of rejection is not in the Constitution because that *idea* is not there. "The concept of rejection is not there to be found and is, *therefore,* extra-constitutional." Those are his words,[1] although the emphasis is ours. Who can gainsay the statement that what is not found in the Constitution is not contained in it?

But the Solicitor General at once abandons this intransigent position and proceeds to urge the difficulty of finding a satisfactory definition of "the concept of rejection." He says of that concept that, "if it means anything, it means an affirmative vote of rejection of both houses." But he immediately shifts his ground and in the next following sentence says that "logically it must mean more."[2]

This agility leaves us somewhat breathless. How are we to reconcile the statements that the concept of rejection can mean only one thing but that, "logically," it means something else? In explanation of the latter statement, the Solicitor General proceeds to say that the defeat in both houses of a resolution for ratification is "in substance the same as the adoption of a resolution of rejection." He adds that the defeat in one house of a motion to ratify, or a disagreement between the two houses of a legislature, one ratifying and the other rejecting; or the failure of one

[1]Amicus Brief for U. S., p 1.
[2]Ibid., pp. 11 and 12.

house to concur in a resolution of ratification adopted by the other house, or ratifications in both houses but in different terms ("with conditions or alterations"), might be considered as rejections, although he is good enough to say that he believes we "would stop short of imposing so drastic a restriction on the amending process."[1]

We have never entertained the thought of "so drastic a restriction." In our former brief, while we made mention of various forms of failure or refusal to ratify as indications of public opposition to the proposed amendment, we insisted that decisive action of a State legislature on a proposal for amending the Constitution must be by the adoption in both houses of an affirmative resolution, either ratifying or rejecting the proposal. This was our definition of "the concept of rejection." It seems to us plain that a mere refusal to take action, whether by both houses or by one, or a defeat of a resolution of ratification, whether by both houses or by one, however significant it may be, in a given case, of hostility to the proposal, cannot be counted as an exercise of the power to reject, which we claim is implied in Article V. Only affirmative concurrent action by both houses is a clear expression of a conclusive decision, for or against the proposal. A refusal to act by one or both houses or adverse action by one or both houses upon a motion to ratify might very well be due to a desire to take further time for consideration. Doubtless such action has frequently been taken because of settled opposition. Only

[1]Amicus Brief for U. S., pp. 12 and 13.

the other day (February 20, 1939) the Massachusetts House of Representatives defeated a motion to ratify the Child Labor Amendment by a vote of 195 to 13 and it was stated in the press report of that action that it "marked the fifteenth unsuccessful attempt to obtain the State's endorsement of the Amendment." This was undoubtedly a renewed expression of the opposition of the people of that State to this proposal, which it had affirmatively rejected as early as 1925. But this latest action of the Massachusetts House, if standing alone, could not be counted as an affirmative rejection of the proposal. It is only an affirmative rejection by both houses of a legislature which we claim constitutes a final and conclusive vote of a State against such a proposal.

This is the definition of "the concept of rejection" which we propose and we submit that it dissipates all of the doubts and misgivings entertained by counsel for the United States.

But the Solicitor General finds still a further difficulty. He says[1] that "the notion of rejection as precluding reconsideration by a legislature is hostile to the deliberative and representative character of the amending process." He borrows the great names of Madison[2] and Story[3] to support this thesis. The only expression found in The Federalist, No. 43, which has any tendency to support the Solicitor General's position is the following:

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[1]Amicus Brief for U. S., p. 13.

[2]The Federalist, No. 43.

[3]Story on the Constitution, p. 600 (5th ed.).

> "It" [Article V] "guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults."

We assume that no one will be inclined to dispute the soundness of this statement but it seems to us to throw little light upon our subject. The passage referred to in Judge Story's Commentaries is as follows:

> "Two-thirds of congress, or of the legislatures of the states, must concur in proposing, or requiring an amendment to be proposed; and three-fourths of the states must ratify them. Time is thus allowed and ample time for deliberation, both in proposing and ratifying amendments. They cannot be carried by surprise, or intrigue, or artifice. Indeed, years may elapse before a deliberate judgment may be passed upon them, unless some pressing emergency calls for instant action. An amendment, which has the deliberate judgment of two-thirds of congress and of three-fourths of the states, can scarcely be deemed unsuited to the prosperity or security of the republic."

It will be observed that Judge Story was speaking of the time allowed for action both by Congress and the States. As was pointed out in our first brief, this process has always taken a long time, as is shown by the following examples:

Frances E. Willard commenced her campaign for the prohibition of the liquor traffic as early as 1874 but the Eighteenth Amendment was not proposed by

Congress until 1917. It was adopted thirteen months after its proposal.

Susan B. Anthony began her campaign for woman's suffrage before 1865, but the Nineteenth Amendment was not proposed by Congress until 1919. It was adopted in less than fifteen months after its proposal.[1]

The agitation for the repeal of the Eighteenth Amendment was commenced in 1919 but the Twenty-first Amendment was not proposed by Congress until 1932. It was adopted nine and one-half months after its proposal.

The agitation for the elimination from the Constitution of the prolonged interval between the election of members of Congress and their taking office was begun many years ago but the Twentieth Amendment was not proposed until 1932. It was adopted eleven months after its proposal.

Florence Kelley began the campaign for a child labor amendment in 1905, but it was not proposed by Congress until 1924. It was affirmatively rejected by both houses in 22 States within eighteen months after its proposal, as against 4 ratifications. We do not count here 13 additional States in which it had, within the same time, been affirmatively rejected by one house or defeated on motion to ratify.

We surmise that, if Judge Story were with us now, he would say, with reference to the present status of

[1] In the *Westminster Review* for July, 1851, John Stuart Mill wrote, "Most of our readers will probably learn from these pages for the first time that there has arisen in the United States . . . an organized agitation on a new question—the enfranchisement of women." ("Dissertations and Discussions"; London, 1859.)

the Child Labor Amendment, that thirty-four years was ample time for "a deliberate judgment" upon Mrs. Kelley's proposal. Certainly he would not say that the rejection of that proposal had been "carried by surprise, or intrigue, or artifice." If anything, the shoe is on the other foot.

The Solicitor General next makes the suggestion that the omission by Congress to limit the time for adoption of the Child Labor Amendment was intended to give an unusually long time for consideration of the proposal and in support of this idea he says that

> "It is of the essence [of the amending process] that there be opportunity, at least before rights have become vested, for renewed consideration in the light of fuller knowledge and further reflection. The tendency to reject what is novel may induce a rejection which on more sober second thought will appear to have been ill considered. Or, the rejection may have sprung from a misapprehension of the popular will, only subsequently made clear. There should be no vested rights in action thus regretted and renounced."[1]

To all of this we respond that the whole history of the exercise of the powers conferred by Article V refutes the notion that, following the proposal for an amendment by Congress, any such prolonged period for deliberation or any such opportunity for recantation is required or was intended. The average time

[1] Amicus Brief for U. S., p. 13. See also Respondents' brief, *Coleman v. Miller*, p. 18 *et seq.*, and Amicus Brief for Wisconsin, p. 18, *et seq.*

taken for the adoption of the twenty-one amendments now in effect was one year and eleven months after proposal. The average time taken for the adoption of the last eleven amendments (following the "Bill of Rights") was one year, six months and thirteen days after proposal. The "ample deliberation" mentioned by Judge Story (except in the case of the three Civil War Amendments) has invariably taken place prior to proposal by Congress. With the exceptions noted, action by the States has always followed close on the heels of proposal.

The Thirteenth, Fourteenth and Fifteenth Amendments were the fruits of the victory of the Union armies. It can hardly be said that deliberation had a part either in their proposal or their adoption. They were, as Charles Sumner himself said, "born of the bayonet."[1] They come under Judge Story's exception, "unless some pressing emergency calls for instant action."

It is quite grotesque to suppose that a proposal by Congress for amending the Constitution comes as a complete surprise to the States and their citizens. Is it meant to be suggested that the deliberations of Congress on such a question are conducted for years behind closed doors, that the matter under consideration is never mentioned on the platform or in the press and that the proposal comes to the States as a "novelty" which must be rejected by one or more of them just because it is a novelty and that there should, consequently, be an opportunity for "more sober second

[1]Curtis, "Constitutional History of the United States," Vol. II, p. 394.

thought?" Both reason and experience confute such an idea. We submit that the framers of the Constitution, having required a finding of necessity by two-thirds of both Houses of Congress as a prerequisite to the proposal of an amendment, contemplated that this would not occur until after full public discussion, in and out of Congress, and consequently intended that action by the States, upon the submission of the proposal to them, should follow promptly and, to that end, that the first affirmative action of a State should be conclusive and final upon that submission.

We pause here to note that the idea of rejection of a proposed amendment is not unknown to the literature of the Constitution. In *Rhode Island* v. *Palmer* (National Prohibition Cases)[1] Mr. Justice Van Devanter, writing the opinion of the Court, said:

> "The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification *or rejection* of amendments to it" (italics ours).

George Ticknor Curtis, in his "Constitutional History of the United States",[2] said:

> "Perfect freedom in the adoption *or rejection* of any amendment is a fundamental right of every state, *implied in the framework of the amending power*" (italics ours).

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[1]253 U. S. 350, 64 L. Ed. 946.

[2]Vol. II, pp. 376-7.

Horace E. Flack, in his book, "The Adoption of the Fourteenth Amendment", says:

> "The Amendment having passed Congress June 13, 1866, was formally presented to the Secretary of State June 16, and was by him submitted to the several States for ratification *or rejection.*"[1] (Italics ours.)

And he opens Chapter IV of the same work by saying:

> "It now becomes our duty to trace the course of the Amendment before the Legislatures of the several States and to determine, if possible, what they thought it meant and what reasons were given for its approval or disapproval."[2] (Italics ours.)

David K. Watson, in his treatise, "The Constitution of the United States", says:

> "Whether an amendment is proposed by Congress or by convention, it is ratified *or rejected* by the representatives of the people either in the legislatures or in conventions and not by the people voting on it directly."[3] (Italics ours.)

> "When the Fourteenth Amendment was pending in the Senate, Senator Buckalew tried to secure the insertion of a provision 'that the amendment should be passed upon by the legislature of each State at its first session next after its submission, and that no acceptance *or rejection* should be reconsidered or again brought in question at

[1]Chapt. III, "The Amendment before the People," p. 140.
[2]Ibid., Chapt. IV, "The Amendment before the States," p. 161.
[3]Vol. II, p. 1310.

any subsequent session, nor shall any acceptance of the amendment be valid if made after three years from the passage of this resolution', but this was rejected by the Senate. It is, therefore, an unsettled question how long a time the States have in which to ratify an amendment.'"[1] (Italics ours.)

The Buckalew incident is perhaps pertinent for another reason, since it shows that neither the Senator nor the Senate made any discrimination between ratifications and rejections, with respect to their finality.

In our first brief we took occasion to discuss at length the theory advanced by Judge Jameson and adopted by a majority of the later commentators on the Constitution to the effect that, while a State may change its vote from rejection to ratification, it cannot change it the other way, from ratification to rejection.[2] It is well understood that this theory took its rise in the transaction connected with the adoption of the Fourteenth Amendment. We shall not go over that ground again. In short, we have taken the position that the functions and powers of State conventions and State legislatures in passing upon a proposed amendment are identical, a position that is taken by Judge Jameson.[3] We said that no writer had been bold enough to assert that a State convention, having adjourned *sine die* after adopting a resolution of rejection, could thereafter re-assemble and adopt a resolution of ratification.

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[1]Ibid., p. 131.

[2]Brief for respondents, pp. 18-36.

[3]Op. cit., *supra*, §586 (4th ed.).

This challenge has now been taken up. The Solicitor General of the United States, the Attorney General of Wisconsin and the Attorney General of Kansas now make that assertion, but upon different grounds. The Attorney General of Kansas seems, at first, to admit, though faint-heartedly, that action by a convention is final. He says:

> "A convention is an extraordinary body of representatives of the people convened only on a special occasion for a specific purpose. It comes into existence for a specific purpose, it acts, and upon adjournment *sine die,* it becomes *functus officio.*"[1]

In this respect he thinks that a convention differs from a legislature, since "the personnel comprising the legislature may change from time to time but the powers, privileges, and duties of the legislature are continuing, unaffected and undiminished by any change in personnel." His position, therefore, is that, even though the action of a convention in rejecting a proposed amendment be final and conclusive, similar action by a legislature is not.

The Attorney General of Wisconsin indulges in no such refinements. He asserts that a convention, equally with a legislature, may ratify after having rejected.[2] The Solicitor General of the United States finds no flaw in the theory that a legislature has greater powers than a convention in this regard, but neither does he see any reason why a convention, hav-

[1]Brief for respondents, *Coleman* v. *Miller*, p. 19.
[2]Amicus Brief for Wisconsin, p. 12.

ing rejected, might not, like a legislature, subsequently ratify.[1]

The only precedent on this point is the action of Congress in directing the Secretary of State to count New Jersey and Ohio as ratifying the Fourteenth Amendment, despite their attempts to rescind their former ratifications. If this precedent is to be followed, it authorizes the conclusion that a State legislature cannot reject after having ratified. We can only repeat that we think the rule as to the finality of first action must work both ways and that the first action taken by a State, upon that submission of the question, is final and conclusive, whether it be by way of ratification or rejection. We cannot admit the claim that a State legislature, in exercising a non-legislative function under Article V, can reverse the action of a former legislature, merely because it can do so, as Chief Justice Marshall said, "so far as respects general legislation."[2]

Before leaving this subject, we think it of some importance to notice a statement made by the Solicitor General as to still another precedent supposed to have been set by the action of Congress in dealing with the Fourteenth Amendment.[3] In opposing the view that a proposal for amendment is defeated by concurrent rejections in more than one-fourth of the States, he says:

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[1]Amicus Brief for U. S., pp. 23-24.

[2]*Fletcher* v. *Peck*, *supra*.

[3]Amicus Brief for U. S., p. 22.

> "It is noteworthy that the precedent of the Fourteenth amendment is strictly relevant on this question, since 10 States out of 37 rejected the Amendment before any of the 10 ratified."

The trouble with this "precedent" is that the facts do not support it. A precedent, in the vocabulary of the law, is a decision by a court or a public official or a political body, authorized to make the decision, which will serve as a rule or guide for future decisions upon similar or analogous facts. It presupposes knowledge of all pertinent facts on the part of the person making the decision. In the instance cited, Congress acted upon the information supplied by Secretary Seward's first proclamation of the adoption of the Fourteenth Amendment. The Act of 1818 required him to name the States which had ratified. Twenty-eight ratifications were required for adoption. The Secretary first named twenty-three States as having ratified but pointed out that two of them, Ohio and New Jersey, had attempted to rescind their former ratifications and expressed a doubt as to their right to do so. He also listed six other States as having ratified by "carpet-bag" legislatures, or, as he expressed it, "by newly constituted and established legislative bodies avowing themselves to be, and acting as the legislatures respectively of the States of Arkansas, Florida, North Carolina, Louisiana, South Carolina and Alabama." No mention whatever was made in that proclamation of any rejections of the proposed amendment, except

those attempted by New Jersey and Ohio, after first ratifying.[1]

It was upon this information that Congress acted when, on the day following Seward's first proclamation (July 21, 1868), is declared the amendment to have been ratified by the twenty-nine States mentioned in the proclamation and directed the Secretary to "promulgate" the amendment as part of the Constitution of the United States. It is obvious that this action by Congress cannot be regarded as a decision that concurrent rejections in more than one-fourth of the States had not defeated the proposal, since the Secretary's proclamation, upon which the action of Congress was based, showed no rejections.

Even Secretary Seward's second proclamation (July 28, 1868), which set out in detail all the information in his office as to action taken by the States on this proposal, including both rejections and ratifications, showed only eight rejections in all (North Carolina, South Carolina, Georgia, Texas, Virginia, Kentucky, Delaware and Maryland).[2] It thus appears that, even if all of this information had been before Congress when it adopted its resolution of July 21, 1868, directing the Secretary of State to promulgate the Amendment as part of the Constitution, that action could not possibly constitute the precedent which the Solicitor General claims.

Before dismissing finally the "precedent" of the Fourteenth Amendment, we take notice of a criticism

[1] 2 Doc. Hist. of Constitution of U. S., p. 783.

[2] 2 Doc. Hist. of Constitution of U. S., p. 788.

of the opinion of the court below, made by the Attorney General of Wisconsin.[1] The court below, in discussing the transactions connected with the adoption of the Fourteenth Amendment, had made the following statement:

> "So far as concerns the precedent set by Congress in connection with the adoption of the Fourteenth Amendment, its view is authority for the proposition that a State which has once ratified an amendment has exhausted its power and cannot thereafter reverse its stand. On the other hand, when it comes to the counting of the votes of Georgia and the two Carolinas, the avowed justification of this was not that those States could ratify despite their previous rejections, but that their previous rejections were void because the then governments of those States were illegal and their Legislatures were without authority to act at all."

Upon this, the Attorney General of Wisconsin makes the following comment:

> "There is no law, statute, enactment or proclamation that supports the statement of the court that the avowed justification for counting the votes of Georgia and the two Carolinas was that the prior action of rejection by the three legislatures was action by legislatures without authority."

In answer to this criticism we quote the following excerpts from "The Constitutional History of the

[1] Amicus Brief, Wisconsin, p. 6 *et seq.*

United States" by George Tickhor Curtis,[1] at the point where the author points out the interrelation between the Fourteenth Amendment and the first Reconstruction Act:

> "It could not be, and it was not expected, that the legislatures existing in the Southern States when the reconstruction acts were passed would ratify the Fourteenth Amendment. Men who had fought through a long and bloody war to establish an independent country could not vote to disfranchise themselves and their fellow-citizens; could not consent to exclude from public office, federal or state, a large class of the most intelligent and important of their own people; could not consent that federal power, exerted through the process of amendment, should determine who were to be deemed citizens of a state; could not consent to render invalid the debts contracted by their state in carrying on the late civil war, thus destroying state securities in which much private property was invested."

After stating that the process devised for securing the adoption of the Fourteenth Amendment "was one of coercion," the author proceeds as follows:

> "The process devised for this purpose by the reconstruction acts was to treat the governments existing at the time of the passage of the acts as merely provisional, and as having no other authority than such as the commanding general of the district might allow; to authorize a convention of delegates to be elected by the male citizens

[1]Vol. II, p. 380, *et seq.*

of the state, twenty-one years old and upward, of whatever race, color, or previous condition, who had been resident in the state for one year previous to the day of such election, *except such as may be disfranchised for participation in the rebellion,* or for felony at common law; to authorize the convention thus chosen to frame a constitution of government in conformity with the Constitution of the United States in all respects, which constitution of the state government must provide that the elective franchise shall be enjoyed by all such persons as have the qualifications fixed by the act for electors of delegates; to have the constitution so framed ratified by a majority of the persons voting on the question of ratification, who are qualified by the act as electors of delegates. *It was then further provided that,* 'when such constitution shall have been submitted to Congress for examination and approval, and Congress shall have approved the same, *and when the state, by a vote of its legislature elected under said constitution, shall have adopted the amendment to the Constitution of the United States prepared by the Thirty-ninth Congress, and known as Article XIV, and when said article has become a part of the Constitution of the United States,* said state shall be declared entitled to representation in Congress, and senators and representatives shall be admitted therefrom on their taking the oath prescribed by law, and then and thereafter the preceding sections of this act shall be inoperative in said state; *provided that no person excluded from the privilege of holding office by said proposed amendment to the Constitution of the United States shall be eligible to election as a member*

of the convention to frame a constitution for any of said rebel states, nor shall any such person vote for members of such convention.'"[1] (Italics ours.)

It is thus seen how closely the Eighteenth Amendment and the Reconstruction Acts were tied together. We cannot imagine a more complete and explicit avowal of an intent to reconstruct the governments of the secession States, so that former rejections by any of them of the Amendment could be treated as void and the assured ratifications of the Amendment by the succeeding "carpet-bag" governments could be counted.

The Attorney General of Wisconsin submits the following observations upon the "precedent" of the Fourteenth Amendment:

> "It is submitted that the force of the fourteenth amendment as a precedent cannot be waived aside upon any theory that the prior rejections of Georgia and the Carolinas were of no significance in that these rejections were by legislatures having no authority to act at all.
>
> "In view of the doubtful constitutionality of the reconstruction acts, *Ex Parte Milligan*, 4 Wall. 2, probably what we actually have with respect to the action of Georgia and the Carolinas in the matter of rejection of the fourteenth amendment is that of rejection by a validly constituted legislature and ratification by an invalidly constituted legislature. See Chs. 29 and 30, 3 Warren, The Supreme Court in United States History. If a proposed amendment may be rejected by a legally constituted authority and subsequently ratified by

[1] Section 5 of the first Reconstruction Act.

an illegally constituted authority, no reason at all is perceived why an amendment may not be rejected by a legally constituted authority and subsequently ratified by a legally constituted authority."

Ex parte Milligan was decided April 3, 1866, the opinion being delivered December 17, 1866. The first Reconstruction Act was not passed until March 2, 1867, so that the *Milligan* case, at best, could have only an indirect bearing upon the validity of that subsequent legislation. In that famous case it was held that a military commission, sitting in the loyal State of Indiana, where Federal authority was always unopposed and the courts always open, had no jurisdiction to try a person, not a resident of one of the rebellious States nor a prisoner of war, but a citizen of Indiana who was never in the military or naval service. Important as this decision proved to be in other respects, it can hardly be said to have foreshadowed a doubt as to the validity of the Reconstruction Acts.

The concluding sentence of Chapter 30 of Warren's "The Supreme Court in United States History," cited in the Wisconsin brief, is as follows: "Thus, this hotly contested legal question of the validity of the Reconstruction Laws disappeared from the Court's history, without any express decision."

In view of all this, it is hardly necessary to discuss the purely hypothetical case of a proposed amendment "rejected by a legally constituted authority and subsequently ratified by an illegally constituted authority."

WHAT IS A "REASONABLE TIME" FOR ADOPTION?

Here, for the first time, we come upon a judicial precedent. In the *Dillon* case [1] this Court examined Article V with a view to determining whether or not there is implied in its terms any limitation of the time within which a proposal by Congress for amending the Constitution must receive the approval of three-fourths of the States, if it is to become part of the Constitution. It concluded that there is such an implied limitation; that an alteration of the Constitution proposed today has relation to the sentiment and felt needs of today; that proposal and ratification are not unrelated acts but are succeeding steps in a single endeavor, not to be widely separated in time; that such an alteration is to be proposed only when Congress has concluded that there is a necessity for it and that consequently the proposal itself is to be considered and disposed of presently; that, since ratification is but the expression of the approbation of the people, it must be sufficiently contemporaneous in the requisite number of States to reflect the will of the people in all sections at relatively the same period, and that the proposal, if not adopted early while the sentiment which prompted it may fairly be supposed to exist, should be regarded as waived and not again to be voted upon, unless a second time proposed by Congress. And the Court added:

> "That this is the better conclusion becomes even more manifest when what is comprehended in

[1] Dillon v. Gloss, 256 U. S. 368, 65 L. Ed. 994.

the other view is considered; for, according to it, four amendments proposed long ago—two in 1789, one in 1810 and one in 1861—are still pending and in a situation where their ratification in some of the States many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable."

We have restated these well-known declarations of the Court because we think the doctrine thus announced points the way to the solution of the questions stated in the opening paragraphs of this brief.

For a reason which we do not understand, this part of the opinion in the *Dillon* case has been sometimes described as something said by the way and not essential to the decision of the case. It was, on the contrary, the cornerstone of the decision. In that case the Court was required to find in the Constitution itself the answer to Dillon's question whether or not Congress had the power to limit the time within which a proposal for amending the Constitution should remain open to adoption. It was only upon the basis of a finding that the Constitution itself required that a proposal for its alteration be disposed of presently, that the Court based its decision that Congress had the power to enforce that requirement by fixing a definite time for adoption.

We discussed this question at length in our first

brief[1] and shall here re-open it only so far as is necessary to meet the counter-arguments found in adversary briefs.

We have heretofore[2] endeavored to answer the argument of this point by the Attorney General of Kentucky and have commented upon the opinion of the Supreme Court of Kansas on this subject.[3] The Attorney General of Kansas[4] takes his stand upon the ground that "it is the deemed necessity for the Amendment that gives it life and the same force must continue its life"; that, "before this Court can say that the proposed Amendment is dead, it must find that its death is the result of a neglect of the States not to ratify but to fail to continue its consideration"; that "a highly controverted question may demand much more time, not because of any lack of need or interest, but because of concentrated opposition on the part of a few selfish interests"; that "the selection of this method of ratification [that is, by legislatures instead of conventions] conveys the idea that the proposal to amend would and should remain alive indefinitely, because that legislative body is alive permanently"; that "this proposal to amend the Federal Constitution remains alive until some effective action is taken by Congress to extinguish it." He concludes his argument on this subject with a statement of the need in a democracy for educated citizens, in recognition whereof *the States* have enacted laws requiring school attendance, establishing

[1]Brief for respondents, *Chandler* v. *Wise*, pp. 42-54.
[2]Ibid., pp. 57-60.
[3]*Coleman* v. *Miller*, 146 Kan. 390, 71 Pac. (2d) 518.
[4]Brief for respondents, *Coleman* v. *Miller*, pp. 17-22.

juvenile courts, probation systems, playgrounds, etc. He then says:

> "Realizing the deterrent to such a program coming from private and selfish interests in the form of inducements to work for small pittances, the people realized the necessity for a Child Labor Amendment."

With much of this we can agree. Everybody is in favor of educating children and of protecting them against the dangers and injurious effects of improper employments. Compulsory school attendance, juvenile courts, probation systems and playgrounds are universally approved. It is quite true that the States have, as Attorney General Beck says, enacted laws for the latter purposes. He might truthfully have added that all the States have enacted laws prohibiting or regulating child labor. All this demonstrates, beyond question, that the people realize the need for governmental regulation of child labor but it does not demonstrate that they realize a necessity for the transfer of the power to exercise such control from the States to Congress. The history of the Amendment before the States demonstrates the exact contrary.

The Attorney General of Wisconsin[1] repeats the argument that Congress omitted a time limit from its proposal of the Child Labor Amendment because it "recognized that this Amendment was one with respect to which time and education might well be deciding factors as to whether the proposed Amendment

[1]Amicus brief, Wisconsin, p. 18 *et seq.*

would ever become a part of the Constitution of the United States." He then proceeds with a brief sketch of the complexity of our industrial civilization from which he concludes that the proposed Amendment "cannot lose its vitality by lapse of time". "The final form of the Amendment," he says, "was the result of months of deliberation by members of Congress, there having been some forty proposed amendments introduced in Congress by Senators and Representatives from fourteen States".

But, after all, Congress alone cannot alter the Constitution and it is apparent that, despite the labors of its members in drafting this proposal, they failed to draft it in terms which met the approval of the people, as expressed in the manner required by the Constitution.

The Solicitor General of the United States opens his discussion of this subject with the statement[1] that our argument "is, in effect, that a conclusive presumption of death arises upon the passage of such a period [*i. e.*, the time elapsed since the proposal of the Amendment], a presumption akin to that arising from seven years' unexplained absence without being heard from". "But the Child Labor Amendment", he says, "has been heard from incessantly".

We do not wish to take too seriously this figure of speech, which was probably intended as a mere rhetorical ornament, but, in case the statement was meant

[1]Amicus brief for United States, p. 24.

seriously, we take the liberty of translating it into realistic terms, as follows:

> "The argument that the proposed amendment of the Constitution is no longer open to ratification because it has failed of adoption within a reasonable time is akin to the legal presumption of the death of a human being from seven years unexplained absence."

The Solicitor General next criticizes the court below for relying upon the *Dillon* case as authority for the view "that the question of what is a reasonable time for the adoption of an amendment is a justiciable question". He says:

> "It was unnecessary in that case to consider whether a proposed amendment would expire with the passage of time in the absence of such a provision, and still less to consider whether the courts could be required to decide that a proposed amendment had in fact expired. It is true that the opinion in the case expressed the view that an amendment cannot pend indefinitely; but nothing was said concerning the authority which would be empowered to declare that the end had come. The answer to the latter question may well turn on the answer to another: whether States which have once ratified may thereafter revoke or rescind their ratification. If they can, the danger that a few States may supplement prior ratifications of an outdated proposed amendment is largely obviated; the States that have ratified can protect themselves by rescinding. The power of the States so

to do has not been judicially determined. Unless and until the power is held not to exist, much of the force is taken from the position that the courts may be required to decide whether a proposed amendment has lapsed. It is perhaps enough to say that distinguished authority can be found for the view that, until an amendment has been adopted by the ratifications of three-fourths of the States, the States do have power to rescind their ratifications."[1]

This argument is arresting for several reasons. In the first place, the Solicitor General, in the latter part of it, abandons a position which he had taken in an earlier part of his brief.[2] He had previously relied upon the doctrine, for which the proclamation of the Fourteenth Amendment is a clear political precedent, that a State cannot change from ratification to rejection and had made reference to Judge Jameson's "notable work" and to numerous other authorities in line with Jameson's conclusion, saying that "the same conclusion has been reached by virtually all who have discussed the question". But now he states the contrary rule with apparent approval, saying that "distinguished authority can be found for the view that, until an amendment has been adopted by the ratifications of three-fourths of the States, the States do have power to rescind their ratifications". (We note, in passing, that the Solicitor General seems no longer to be apprehensive of "the present downfall of the Fourteenth Amendment".)

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[1]Amicus Brief for U. S., pp. 25-26.
[2]Ibid., pp. 20 *et seq.*

In a footnote he gives citations to these "distinguished authorities", to-wit, "communications" from George Ticknor Curtis, Senator Reverdy Johnson, of Maryland, and William O'Conor, of New York, included in an address by C. H. Winfield ("privately printed, Jersey City, 1868"). He even cites the "purported" withdrawals by New Jersey and Ohio of their ratifications of the Fourteenth Amendment, despite the decision of Congress to ignore those withdrawals. But immediately thereafter he refers to other "authorities", who, if not as distinguished as Curtis, Johnson, O'Conor and Winfield, are at least more numerous, as taking "the view that a ratification cannot be rescinded", to-wit, Jameson, Burdick, Watson, Willoughby, Dodd, Garrett, Miller and Wheeler.

As to the Solicitor General's comment on the *Dillon* case, found in the passage from his brief quoted above, we submit that it is hardly accurate to say, as he does, that in that case the Court said nothing "concerning the authority which would be empowered to declare that the end had come". In that case the Court decided (1) that the Constitution itself inferentially limits the time within which a proposal for its alteration may be adopted, (2) that Congress has the power to define that limitation by fixing the exact time, "within reasonable limits", in which adoption must follow proposal, and (3) that the period of seven years fixed by Congress in that proposal was not too short but, on the contrary, was ample, in view of the much shorter time required for the adoption of all previous amendments. It is true that the Court did not say expressly that

seven years was not too long but, since the decision was based primarily on a finding that the Constitution itself required that proposal and adoption be not widely separated in time, it seems a necessary inference that, if it had been called upon to decide that question, it would have said that seven years was not too long.

But we are concerned here only with the Solicitor General's denial that in the *Dillon* case it was assumed that "the question of what is a reasonable period for the adoption of an amendment is a justiciable question". We think that it is an inescapable conclusion that the Court regarded all questions involved in the *Dillon* case, whether expressly decided or not, as justiciable. If they are not, then there is no power anywhere to enforce the requirement of the Constitution that adoption follow proposal within a reasonable time.

It is suggested by the Attorney General of Kansas[1] that this power resides in Congress. He says:

> "We contend that this proposal to amend the federal constitution remains alive until some effective action is taken by Congress to extinguish it."

We assume that it is meant by this that Congress has the power to withdraw a proposal for amendment at any time before its adoption. This has never been attempted and consequently the question has never been the subject of judicial consideration or decision,

[1]Respondents' Brief, *Coleman* v. *Miller*, Oct. Term, 1938, No. 7, p. 21.

but professional speculation on this question seems to be against the existence of such power.[1]

The Solicitor General concludes his argument on the subject of the lapse of a proposal for amendment with a review of the history of the Child Labor Amendment before the States.[2] This leads him to make some allusions to the supposed importance of the Amendment, a subject which we have studiously avoided because we think it not germane to the constitutional questions involved. Perhaps, however, we should notice some of his statements with reference to the present interest in the subject, since this is claimed as evidence of the continued vitality of the proposal.

The Solicitor General joins the Attorney General of Kentucky in claiming that there has been a fair continuity of favorable interest in the proposal from the beginning to the present time. He admits that there were only two ratifications from 1926 to 1932, inclusive, a period of seven years, but he says that those years were not barren of interest in the proposal since, "'in every odd-numbered year resolutions to ratify the Amendment were introduced in a substantial number of state legislatures,'' eleven in 1927, nine in 1929 and seven in 1931.

This information is found in "Appendix A" in the Solicitor General's brief. We do not question its accuracy, although it is not to be found in the tran-

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[1]Jameson, 4th ed., §585.
Orfield, "The Procedure of the Federal Amending Power," XXV Ill. Law Rev., 429.

[2]Amicus Brief for U. S., pp. 28-33.

script of record in this case. It will be noted in the first place that it was only in fifteen out of forty-four non-ratifying States that these resolutions were introduced and in only two of them did the resolution result in ratification. It cannot be claimed that this is a very impressive showing of favorable public sentiment during that time. After all, it is only by the adoption of resolutions of ratification that the Constitution can be altered. The mere introduction of twenty-nine such resolutions in the legislatures of fifteen out of forty-four recalcitrant States in the course of seven years can hardly be regarded as significant, particularly in view of the defeat of twenty-seven out of twenty-nine such resolutions.

The Solicitor General notes as "significant" that "no State which ratified has proposed to withdraw, while eight States which affirmatively rejected have subsequently ratified."

During the nine years succeeding the making of this proposal, only two States had attempted to change from rejection to ratification (to-wit, Colorado and Montana) and, beside these two, only four States had ratified. We can only guess at the motives which actuated these four States in standing by their original ratifications. It may, of course, have been because they were satisfied with their first action. It may have been due to a belief that such a change of position was not permissible under the Constitution, since this was the view of nearly all commentators on the Constitution. But the most likely explanation is that, during those years, it was almost universally believed that the pro-

posal had been conclusively defeated within a year or two after it was made and was no longer open to action of any kind.

The Solicitor General offers as evidence of the continued vitality of the 1924 proposal the present attitude of certain persons and organizations toward that proposal and their continued interest in it, to-wit; certain statements in a report of the Interstate Commerce Committee of the Senate in 1938; letters addressed by President Roosevelt on January 8, 1937, to the Governors of nineteen non-ratifying States whose legislatures were to meet in that year, urging them to press for ratification; "memorials" from the legislatures of Arkansas and California, urging President Roosevelt "to continue his efforts for ratification"; a statement in the *New York Times* of January 9, 1937, by former President Hoover, expressing his well-known partiality for the Amendment; certain publications of the United States Department of Labor, of the Children's Bureau, of the White House Conference on Child Health and Protection, of the President's Committee, 1933, of the American Federation of Labor, of the National Conference for Labor Legislation, of the International Association of Governmental Labor Officials, of the National Child Labor Committee, of the National Non-Partisan Committee for ratification of the Federal Child Labor Amendment, etc.

He even goes so far as to cite the favorable action of the Senate Judiciary Committee on Senator Van-

denburg's resolution for the proposal of a new and radically different child labor amendment, confining the proposed grant of power to Congress to the limitation and prohibition of "the employment for hire of persons under sixteen years of age." Of this Committee action, he says that it "made it clear that the pending Amendment had not lapsed, but merely that in the opinion of the Committee it was not likely to be ratified by the necessary majority of States,"[1] It is a little difficult to follow the argument that the opinion of the Committee that the pending Amendment was not likely to be adopted "*made it clear*" that it had not lapsed.

Of this roll-call of present supporters of the 1924 proposal we would only say that, with the exception of Mr. Hoover, of the American Federation of Labor and possibly of Mr. Burlingham's National Non-Partisan Committee for Ratification, all of these Committees, Bureaus, Conferences and Associations are, as we are advised, agencies or off-shoots of agencies of the Department of Labor. As to the American Federation of Labor, one of its motives was, we think, exposed by the present Secretary of Labor in February, 1934, when, in addressing the Kentucky legislature in advocacy of the proposal, she declared that "there is not enough work

[1]Senate Report 788, on the Vandenberg resolution, was handed in June 15, 1937, by Senator Logan of Kentucky, of the Judiciary Committee, with the following amendment:

"Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

to go around," and "we must preserve such jobs as there are for adults."

The Solicitor General's last witness is the redoubtable Dr. Gallup. He cites the results of two polls conducted by the Doctor's Institute of Public Opinion. Of the result of these polls he says:

> "The first, reported in May, 1936, showed that of more than 130,000 voters representing a cross-section of public opinion, 61 per cent favored the Amendment; and in 45 States the vote was favorable. Nine months later, in February, 1937, a second vote showed 76 per cent favoring the Amendment; in every State the vote was favorable."[1]

While Dr. Gallup's method of estimating the status of public opinion upon a given subject has, since the last presidential election, enjoyed a reputation for substantial accuracy, we think its inaccuracy in this instance can be demonstrated. Let us take the 1937 poll, since this is not only the latest but also the most favorable to the Amendment. The question which was put to the "cross-section" of the population in that instance was, "Do you favor an amendment to the Constitution giving Congress the power to limit, regulate and prohibit the labor of persons under 18?" This question, while stating accurately the terms of the 1924 proposal, would, we think, if put casually to the average person without further explanation, be

[1] Amicus Brief for U. S., p. 33.

not unlikely to strike him as a mere inquiry as to his opinion of governmental control of child labor. The poll itself gives us no assurance that the persons who answered this question had their attention called to the existing regulation of child labor by all the States, nor to the greatly reduced number of employed children as contrasted with, say, ten years earlier, nor to other like considerations. For example, in connection with the report of the result of the 1936 poll, Dr. Gallup gave as "typical" the following explanations of their votes by persons who voted "Yes":

> "Children under eighteen should all be in school, not out working, there is plenty of time for that later."
>
> "It will help solve unemployment by providing more jobs for older people who need work most."
>
> "We must protect our children. They can't stand shop work. It ruins their health."[1]

It is obvious that persons who gave such explanations were not considering the relative advantage of State and Federal control.

In the poll of February, 1937, every State in the Union was reported by Dr. Gallup as being in favor of the Amendment and the percentage of all voters who favored ratification was reported to be 76, as against 61 per cent. in 1936.

Let us compare this with the poll of its members taken by the American Bar Association nine months

[1]Copyright article by American Institute of Public Opinion; The Dallas Morning News, May 24, 1936.

later, in November, 1937. The referendum ballots, sent to all members of the Association, contained five questions, which were answered by 14,388 members, although 572 of these ballots were not counted because not accompanied by signature slips. We confine ourselves to the second of these questions, since this is the question which was the basis of Dr. Gallup's polls:[1]

> "*Question Two:* Do you favor the ratification of the amendment, submitted to the States in 1924, providing that Congress shall have power to limit, regulate and prohibit the labor of persons under eighteen years of age?"

The vote was,

Yes: 2,743; No: 10,840.

By majorities, the States stood as follows,

Yes: None; No: 48 States.

The percentage of voters in favor of the proposal was 20, as against Dr. Gallup's 76. The majority in every State was against the proposal, whereas Dr. Gallup reports every State in favor of it.

How are these divergent results to be explained? Admitting that the average opinion of the legal profession may not be the same as that of the public at large, so that some difference in percentages might be expected, it seems improbable that there is a diametric opposition between them. Lawyers are, after all, mem-

[1] XXIII Am. Bar Assn. Journal, No. 12, Dec., 1937, p. 915.

bers of the general community. Their employments bring them in contact with the opinions, problems and prejudices of the generality of mankind. They fill a large proportion of elective offices, an occupation in which a "feel" for, and obedience to, the trends of public opinion is usually regarded as indispensable. We cannot think, therefore, that the Bar Association poll has any less claim to recognition as an index of public opinion than the Gallup poll.

Dr. Gallup, in the report of his poll of February 21, 1937,[1] upon which the Solicitor General relies, featured the following statement:

> "Other states which will be called upon to consider the amendment this year and their vote in today's poll, are:

	Favoring Amendment	Opposing Amendment
Connecticut	81%	19%
Delaware	65	35
Florida	71	29
Georgia	76	24
Kansas	66	34
Maryland	71	29
Massachusetts	55	45
Missouri	66	34
Nebraska	72	28
Rhode Island	88	12
South Carolina	66	34
Tennessee	63	37
Texas	69	31
Vermont	70	30"

Despite the very heavy majorities in these States in favor of the Amendment, as reported by Dr. Gallup,

[1]The Topeka Daily Capital, February 21, 1937.

the action of the legislatures of the States named in their 1937 sessions was as follows: In two of the States (South Carolina and Vermont) no resolution was introduced; in three of them (Florida, Georgia and Rhode Island) resolutions of ratification were introduced but were not brought to a vote; in one of them (Kansas) the validity of a purported ratification is challenged in court; in the remaining eight States a resolution was introduced and was defeated. Ten of these States had affirmatively rejected the Amendment and the remaining four had defeated resolutions of ratification, one in 1924, eleven in 1925 and two in 1927.

What a tragic showing for Dr. Gallup's contemporaneous estimate of the status of public opinion in these States. Is it conceivable that the legislatures of those States, meeting under a fresh mandate from the people of those States, voted in utter defiance of the overwhelming sentiment of the people who had elected them? Although Dr. Gallup gave 70 as the average percentage of favorable opinion in all of those States, not a single one of these fourteen States (except Kansas, where the result is still doubtful) ratified the proposal. We submit that such a defiance of public opinion is inconceivable and that the inevitable conclusion is that Dr. Gallup's appraisal of public sentiment in those States was grossly inaccurate.

The Solicitor General of the United States makes this statement:[1]

[1]Amicus Brief for U. S., p. 31.

"It has not been suggested, nor could it be, that the conditions giving rise to the Amendment have been eliminated. The prevalence of child labor, the diversity of state laws and the disparity in their administration, and the resulting competitive inequities, are facts that exist today as they did in 1924."

We agree that the evil effects of unrestricted child labor justify continual, governmental control and that the conditions which have given rise to that control in every State in the Union would probably arise again, if that control were removed. But we do not agree that the conditions which gave rise to the proposal of the pending Amendment "exist today as they did in 1924". In support of this we offer the following tables, compiled from United States Census statistics for 1920 and 1930, as showing a marked decrease in the number of children gainfully employed, even in that short period of time:

	Total Population 10 to 14 years of age	Gainfully Employed, 10 to 14			
		Agriculture	Manufacturing and Mechanical Industries	Miscellaneous Occupations	Total in all Occupations
1920	8,594,872	328,297	9,733	40,033	378,063
1930	9,622,492	205,563	4,761	25,004	235,328

	Total Population, 14 and 15 years of age	Gainfully Employed, 14 and 15			
		Agriculture	Manufacturing and Mechanical Industries	Miscellaneous Occupations	Total in all Occupations
1920	3,907,710	315,877	175,919	190,999	682,795
1930	4,678,084	263,934	63,505	104,351	431,790

	Total Population 10 to 16 years of age	Total Gainfully Employed, 10 to 16			
		Agriculture	Manufacturing and Mechanical Industries	Miscellaneous Occupations	Total in all Occupations
1920	12,502,582	644,174	185,652	231,032	1,060,858
1930	14,300,576	469,497	68,266	129,355	667,118

In addition, the records of the United States Census Bureau, covering two decades instead of one, show that the number of boys and girls under sixteen, working in all occupations, including farming, decreased more than 66 per cent. from 1910 to 1930.

We also submit the following table, prepared by the Industrial Division of the Federal Children's Bureau:

TABLE 1—Children 14 and 15 years of age receiving first regular employment certificates and rate per 10,000 of these ages in 41 cities, 1927-34.

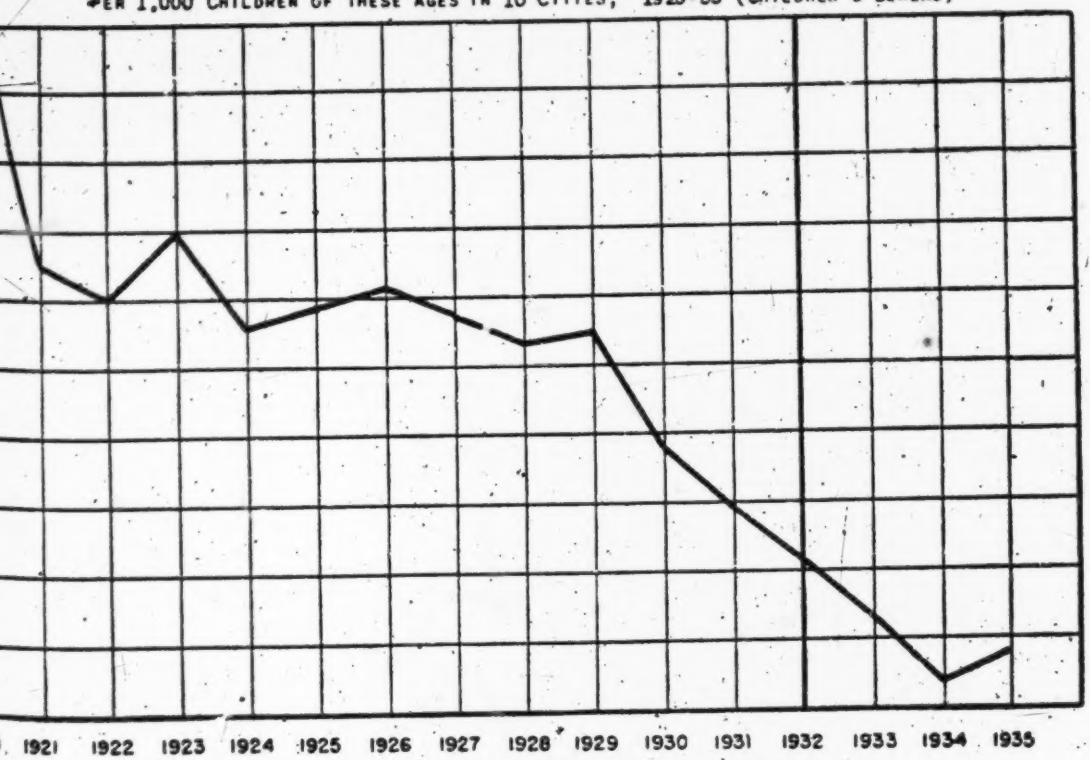
Year	Number	Rate per 10,000 children of these ages	Percent of Change in rate as compared with previous years
1927	71,655	978	.....
1928	67,199	893	—8.7
1929	71,857	930	+4.1
1930	49,082	619	—33.4
1931	37,051	460	—25.7
1932	27,556	336	—27.0
1933	17,042	210	—37.5
1934	5,415	67	—68.1

The Robert Committee, which was formed to investigate the departures from labor and trade practice standards of codes following the invalidation of the NRA, said in its report released on March 17, 1936:

"The provisions of the codes with reference to the employment of children appear to have been better maintained than any other code provision surveyed. The reports from individual establishments would indicate no serious departure from child labor provisions."

To the foregoing we add the following graph, prepared and published by the Federal Children's Bureau, covering fifteen years, 1920 to 1935:

NUMBER OF CHILDREN 14 AND 15 YEARS OF AGE RECEIVING EMPLOYMENT CERTIFICATES PER 1,000 CHILDREN OF THESE AGES IN 10 CITIES, 1920-35 (CHILDREN'S BUREAU)



These statistics speak for themselves. They show that, as a result of State regulation, which itself was the product of an improved public sentiment on this

subject, the evils of child labor are being rapidly eliminated. In view of this, can it be said that *the felt needs* of 1924 are the same as those of 1939? If by the end of 1940 or 1941 the 1924 proposal should be ratified by enough additional States to make up the required three-fourths, could it be said that it had been adopted while the sentiment which prompted the proposal in 1924 could "fairly be supposed to exist"? If, in those circumstances, it had been made to appear that the Congress of 1939 or that of 1940 was of a different mind from the Congress of 1924 (as, for example, by its proposal of the so-called Vandenberg Amendment), could it be said that Congress and three-fourths of the States had co-operated in "a single endeavor"?

But we shall not pursue these speculations further. What has been suggested shows, we think, to what a travesty the process of amending the Constitution might be reduced, if it should be concluded that the States are powerless to defeat a proposal for amendment.

CONCLUSION.

The excursions of adversary counsel into the field of existing conditions in the employment of children and of public opinion on that subject, have induced us to follow them into that field, although we think the results of this investigation throw little, if any, light upon the constitutional questions involved in this case.

We are painfully conscious of the desultory character of this brief, a fault which was unavoidable, if the multiform arguments found in adversary briefs were to be answered. We depend upon our original brief for a methodical and consecutive statement of our position.

In conclusion, we beg to urge again the importance of a definitive decision of the constitutional questions presented. If this brief has no other utility, it must, at least, have exposed the confusion in which the subject is enveloped because of the conflict of opinion as to the correct interpretation of the Constitution. In our first brief, we emphasized the unhappy consequences which had actually arisen, in the case of the Child Labor Amendment, from the assumption that affirmative rejections of the proposal were of no avail and that a final defeat of that proposal was an impossibility. We expressed the view that such an endless state of vacillation and uncertainty would not have been countenanced by the framers of the Constitution and that the power conclusively to defeat a proposal for amendment was necessarily implied in the power reserved to the States to make the final decision.

We submit that the opinion of the court below demonstrates the correctness of its judgment and that the judgment should be affirmed.

Respectfully submitted,

LAFON ALLEN,
OLDHAM CLARKE,
Attorneys for Respondents.

March, 1939.

SUPREME COURT OF THE UNITED STATES.

No. 14.—October Term, 1938.

Albert Benjamin Chandler, Individually and as Governor of the Commonwealth of Kentucky, et al., Petitioners,

vs.

James W. Wise and Ray B. Moss.

On Writ of Certiorari to the Court of Appeals of the Commonwealth of Kentucky.

[June 5, 1939.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

In January, 1937, the legislature of Kentucky adopted a resolution purporting to ratify the constitutional amendment proposed by the Congress in 1924 and known as the "Child Labor Amendment".[1]

Respondents, citizens, taxpayers and voters in Kentucky brought this suit in the state court to restrain the Governor of the Commonwealth and the officers of the General Assembly from sending certified copies of the resolution to the Secretary of State of the United States and the presiding officers of the Senate and House of Representatives, and for a judgment declaring the action of the General Assembly to be illegal and void. The complaint stated that in 1926 the proposed amendment had been rejected by the General Assembly of the Commonwealth and also by more than a majority of the legislatures of the States, and that the General Assembly could not thereafter legally reconsider and adopt the amendment; and, further, that its action was not taken within a reasonable time after the amendment was proposed.

Upon the filing of the petition, a restraining order was granted and summons was issued. On the same day, but before the Governor was actually served with a copy of the restraining order or summons, he forwarded by mail a certified copy of the resolution to the Secretary of State. It is not claimed that the Governor then knew of the pendency of the proceeding.

Plaintiffs then filed an amended petition setting forth the action taken by the Governor and sought a mandatory injunction to require him to notify the Secretary of State of the pendency of the suit and that the notice which he had sent was void and should be disregarded. That action was not taken. Defendants filed a gen-

[1] 43 Stat. 670.

eral demurrer which was sustained in the Circuit Court but its judgment was reversed by the Court of Appeals. 270 Ky. 1.

The court gave opportunity on the remand to the Circuit Court, with directions to overrule the demurrer, for such further proceedings as were not inconsistent with its views. Upon that remand the defendants declined to plead further and judgment was entered in accordance with the opinion of the Court of Appeals. The judgment so entered set forth (1) that an actual controversy existed between the parties, that the plaintiffs had the right to maintain the suit and the court had jurisdiction; (2) that the resolution of the legislature purporting to ratify the proposed amendment was void, not having been ratified according to the provisions of the Constitution of the United States; (3) that the notice given by the Governor to the Secretary of State was of no effect; (4) that the clerk of the court should give official notice to the Department of State that the resolution purporting to ratify the amendment was invalid, that it had not been ratified according to the provisions of the Constitution of the United States, and that the notice given by the Governor was of no effect. The clerk was further directed to send a duly authenticated copy of the judgment to the Secretary of State by registered mail.

On appeal, that judgment was affirmed by the Court of Appeals. We granted certiorari. 303 U. S. 634.

We think that, while the state court had jurisdiction *in limine*, the writ of certiorari should be dismissed upon the ground that after the Governor of Kentucky had forwarded the certification of the ratification of the amendment to the Secretary of State of the United States there was no longer a controversy susceptible of judicial determination.

Dismissed.

Mr. Justice McREYNOLDS and Mr. Justice BUTLER think that the judgment of the Court of Appeals of Kentucky should be affirmed on the authority of *Dillon* v. *Gloss*, 256 U. S. 368, and for the reasons stated in the dissenting opinion in *Coleman* v. *Miller*, decided this day.

Mr. Justice BLACK and Mr. Justice DOUGLAS, concurring.

For the reasons stated in concurring opinion in *Coleman* v. *Miller*, we do not believe that State or Federal courts have any jurisdiction to interfere with the amending process.

We therefore concur in the dismissal.